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ANTECEDENTS OF THE COMMERCE CLAUSE.

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To Mr. Alexander Wylie
Compliments of Henry C. Keener

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ANTECEDENTS OF THE COMMERCE CLAUSE

Foreword

> "To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."

In these words, the people of the United States gave to the Congress what today is, perhaps, the most important of its peace-time powers, that of regulating interstate and foreign commerce. This brief epitome of delegated power, contained in Article I, section 8, clause 3, of the constitution, was agreed to in the Constitutional Convention without a dissenting voice, the original proposition being amplified by adding "and with the Indian tribes", the least important provision of the clause today.

This unanimity of view was due, no doubt, to the conviction in the minds of its framers, that the real necessity for a constitution was caused by that serious deficiency in the Articles of Confederation which resulted from the failure of the States to agree upon a plan for the uniform regulation of commerce by the Federal Government. They had observed that the thirteen independent sovereignties, each guided by its own particular interests and distrustful of the motives of its neighbors, had, at different times, enacted conflicting, and in some instances, burdensome regulations which were productive of jealousy and friction. They were cognizant of the fact that there was a settled aversion on the part of the state legislatures to the delegation of any definite measure of power to the Federal Government either for the regulation of commerce or the pro-

duction of necessary revenue. They understood as well as the States, that the Federal regulation of commerce carried with it the means of providing a revenue for the support of the Government. They realized that, in this situation, the future of the confederacy was faced with disaster in its foreign intercourse and serious difficulty in its domestic affairs, unless some central regulating authority could be superimposed to the wills of the individual state legislatures. Accordingly, disregarding their individual state interests, they acted in harmony for the good of the United States as a whole.

While the Commerce Clause was unanimously accepted by the Convention as a necessary part of the change from State to National control, the broad powers therein given to Congress were amplified and qualified by certain other clauses of the Constitution. The discussion of some of these provisions engendered bitter sectional feeling and in several instances nearly caused the dissolution of the Convention without the accomplishment of its purpose. Happily for constitutional government, certain compromises were agreed to by the contending factions, thus assuring to posterity the benefit of that monumental instrument upon which our national policies have been laid.

The power to regulate interstate and foreign commerce probably would have comprehended the incidental power of laying duties, imposts and excises, but the members of the Convention, mindful of the difficulties experienced under the loosely worded Articles of Confederation, were determined that the delegation of powers to Congress should be so explicit as to warrant their being proof against circumvention by the States. So this power was affirmatively provided for in the second clause of Section 8 of Article I. The power to tax involves the power to destroy. The States, suspicious of their neighbors under the Articles of

Confederation, were equally distrustful in the Convention, of what might be possible under the Constitution. The non-commercial states particularly apprehended that the numerically greater representation of the commercial states would result in legislation which might prove disadvantageous, perhaps disastrous, to them. These fears and suspicions coalesced in the adoption of those prohibitions upon the exercise by Congress of delegated powers, other than in a uniform manner as between the States. In so far as the regulation of commerce is concerned these restrictions are contained in Sections 8 and 9 of Article I.

It is quite remarkable that so important a clause as that for the regulation of commerce should have been expressed so briefly, and thus have left so much for future determination. Perhaps the members of the Convention, feeling that the means justified the end, were willing to leave the final meaning to posterity. Subsequent events indicate that they were not wholly aware of the full power conferred upon the Federal Government.

The commerce clause represents an instance where a national power which was comparatively unimportant for the first eighty years of its existence, has, during the past sixty years developed to such an extent that it is now, perhaps, the most important and conspicuous power possessed by the Federal Government. The members of the Constitutional Convention could not foresee the construction which would be placed upon this important clause by the Supreme Court. While they deemed it essential to the safety of the Federal Union that the Congress should be granted full power over interstate and foreign commerce, there is no question but that any attempt to extend that power to include jurisdiction over commerce wholly within the States would have met speedy defeat at their hands. Yet, the decisions of the courts acting upon our modern transportation agencies, have, in recent years, been tending more and more to that result.

At the time of the adoption of the Constitution, practically all commerce between the states was transported in vessels and boats. Horse-drawn vehicles alone were available for land transportation. In the years that have intervened since that time great strides have been made in the creation and development of transportation instrumentalities. Today much the greater proportion of the commerce between the States is moved by steam and electricity. The Consolidation of railroad properties, year by year, has produced great systems of transportation. The result today is, that all the important railroad systems operate across state lines and are engaged in interstate commerce. These carriers are subject to the regulations of Congress, as well as those of the individual states through which their lines extend. In late decisions by the Interstate Commerce Commission, acting under the authority of laws passed by Congress, the states appear to be shorn of much of the power over intrastate commerce, which, from the time of the adoption of the Constitution down to present has been considered reserved to them.

In Houston & Texas Ry. v. United States, 234 U.S. 342, familiarly known as the "Shreveport Case" the Railroad Commission of Louisiana had complained to the Interstate Commerce Commission that, under Section 3 of the Interstate Commerce Act, the state-made rates from Dallas and other Texas points into East Texas being much lower for greater distances than the interstate rates into the same territory from Shreveport, La., were unduly preferential to Dallas and other Texas points of origin and their shippers and unjustly discriminatory to Shreveport and its shippers. The Commission, after prescribing reasonable rates from Shreveport to East Texas, which were higher than the Texas rates complained of, held that under Section 3, the relation of rates extended an undue preference to

the Texas points of origin and affected an unlawful discrimination against Shreveport, and ordered the railroads involved in the litigation to remove the discrimination. As the Commission had established "reasonable rates" from Shreveport, this could be accomplished only by increasing the Texas intrastate rates. The Railroad Commission of Texas resisted these increases, and after affirmation of the Commission's decision by the Commerce Court, the cases were brought to the Supreme Court. That tribunal sustained the opinion of the Commission, holding that while Congress did not possess power to regulate the internal commerce of a state, as such, under the Commerce Clause, it did possess power to foster and protect interstate commerce, although in taking necessary measures so to do it might be necessary to control intrastate transactions of interstate carriers. In American Express Co. v. Caldwell, 244 U.S. 617, and Illinois Central R.R.Co. v. Public Utilities Commission, 245 U.S. 493, the principle enunciated in Houston & Texas Ry. v. United States, supra, was reaffirmed.

In the Transportation Act, 1920,[1] among other things, the substance of the so-called Shreveport Doctrine was enacted into law by Congress, and made a part of Section 13[2] of the Interstate Commerce Act. Another section of the Transportation Act, 1920,[1] also made a part of the Interstate Commerce Act, as Section 15-A,[3] provided substantially that the Interstate Commerce Commission, in the exercise of its power to prescribe just and reasonable rates, should initiate, modify, establish or adjust rates, which for the two years following March 1, 1920, should yield to the carriers of the country as a whole, or as a whole

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[1] Act of Congress approved February 28,1920, 41 Stats. L.456.
[2] Act of Congress approved February 28,1920, 41 Stats. L.484.
[3] Act of Congress approved February 28,1920, 41 Stats. L.488.

in each of such rate groups as the Commission might designate, a return of 5½ per cent on the aggregate value of the railway property of such carriers held for and used in the service of transportation. Upon petitions filed by substantially all railroads of the United States praying an increase in rates under Section 15-A of the Interstate Commerce Act, the Commission instituted an investigation, and after formal hearing established certain rate groups and authorized horizontal increases in interstate passenger fares, freight rates and certain other allied charges.[1]

Upon applications filed by the interstate carriers, a considerable number of states declined to permit increases in state rates, fares and charges equivalent to the increases authorized interstate by the Commission, and issued orders to that effect. This refusal of state authorization varied in the different states. In some states it related to passenger fares, in others, to freight rates; in some states partial increases were authorized, in others all increases were denied. Thereupon, the carriers affected filed petitions with the Commission for relief under the provisions of section 13 of the Interstate Commerce Act. The Commission, applying the Shreveport Doctrine, as enacted in Section 13 of the Act, to these cases in conjunction with its power under Section 15-A to fix reasonable rates calculated to yield a definite return, made prima facie findings of discrimination individually as to each state, and ordered the carriers to impose the interstate in-

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[1] Increased Rates, 1920, 58 I.C.C. 220.

creases upon intrastate traffic.[1] The carriers after securing injunctions in the Federal district courts against the enforcement of the individual state orders, put the increased rates into effect in such states upon basis of the orders of the Commission.

In the Illinois Case, 59 I.C.C., 350, the state authorities contended that paragraph 4 of Section 13 of the Interstate Commerce Act is merely a restatement of the effect of Section 3 of that act, as interpreted by the court in Houston & Texas Ry. v. United States, supra. The Commission dismissed this contention upon the ground that paragraph 4 of Section 13 is much broader than Section 3, in that it forbids and declares unlawful "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce".[2] The Commission construed this additional language as conferring upon it the power to remedy "every dis-

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[1] In the matter of rates, fares and charges of the New York Central Railroad Co., and other railroad companies in the state of New York, 59 I.C.C., 220.
In the matter of Intrastate Rates within the State of Illinois, 59 I.C.C., 350.
In the matter of Intrastate Rates within the State of Illinois, 60 I.C.C., 92.
Wisconsin Passenger Fares, 59 I.C.C., 391.
Arkansas Rates and Fares, 59 I.C.C., 471.
Minnesota Fares and Charges, 59 I.C.C., 502.
Iowa Passenger Fares and Charges, 60 I.C.C., 55.
Montana Rates and Fares, 60 I.C.C., 61.
Indiana Rates, Fares and Charges, 60 I.C.C., 337.
Nebraska Rates, Fares and Charges, 60 I.C.C., 305.
Ohio Rates, Fares and Charges, 60 I.C.C., 78.
South Carolina Rates, Fares and Charges, 60 I.C.C., 290.
Michigan Passenger Fares, 60 I.C.C., 245.
In the matter of Intrastate Rates within the state of Texas, 60 I.C.C., 421.
Utah Rates, Fares and Charges, 60 I.C.C., 388.
North Carolina Fares and Charges, 60 I.C.C., 362.
Louisiana Rates, Fares and Charges, 60 I.C.C., 467.
Georgia Rates, Fares and Charges, 60 I.C.C., 527.
Florida Rates, Fares and Charges, 60 I.C.C., 551.
Nevada Rates, Fares and Charges, 60 I.C.C., 623.

[2] Act of Congress, Approved February 28, 1920, 41 Stats. L. 484.

crimination growing out of the relation between intrastate and interstate commerce which injuriously affects the latter."[1]

The Commission in deciding the state cases, apparently regarded proof of the fact that the interstate rates from and to points in a state had been increased in accordance with its authorization, and the intrastate rates from and to points within the same state had not been similarly increased, sufficient to establish discrimination against interstate commerce. The findings of the Commission as to the entire body of intrastate rates in each state are based primarily upon representative comparisons indicative of theoretical discrimination between interstate and intrastate rates, rather than proof of actual discrimination, which would be requisite to invoke the Shreveport Doctrine.

The Commission, in these cases, has based its opinion upon the fact that Congress, under the Commerce Clause, may take any necessary steps to foster and protect interstate commerce; and if, in the performance of that duty it becomes necessary to guarantee to the instrumentalities of commerce a definite return on their fair value, any deviation from the mandate of Congress by state authorities creates an unjust discrimination against interstate commerce. It has never been seriously contended that Congress has any power over intrastate commerce, as such. Moreover, in so far as the Commission is concerned, intrastate commerce is specifically exempted from its jurisdiction by Section 1 of the Interstate Commerce Act.[2] But here, it is argued, the exercise of the Federal power will be restrained to the point of rendering measures necessary for the protection of interstate commerce as a whole ineffectual, if the states are permitted to deny the insturmentalities of commerce rates which will yield

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[1] In the matter of Intrastate Rates within the State of Illinois, 59 I.C.C., 350, 362.

[2] 41 Stats. L. 474.

the return set by Congress.

While there are, no doubt, many arguments which might be advanced, as to the extent of the power of Congress over intrastate commerce, as such, and its application to these cases, the subject is discussed here, apart from its merits, solely for the purpose of indicating the consequences which may follow this construction of the law. It is safe, perhaps, to assume that Congress has no power over intrastate rates which are wholly unrelated to interstate rates. The Commission appears committed to this view, for a paragraph similar to the following is inserted in its findings in each of the state cases:

"These findings are without prejudice to the rights of the authorities of Montana, or of any other interested party, to apply in the proper manner for a modification of our findings and order as to any specific intrastate fare or charge on the ground that the latter is not related to the interstate fares and charges in such a way as to contravene the provisions of the Interstate Commerce Act."[1]

This being true, the question at issue is whether every intrastate rate, which is related to interstate commerce solely by virtue of the fact that it is made or published by a carrier engaged in interstate commerce, is subject to the power of Congress under the Commerce Clause. Upon this determination, rests the fate of the decisions of the Commission in the state cases.

Under the orders of the Commission, enforced by Federal injunctions against the orders of state regulating bodies which declined to permit increases in state rates equivalent to those authorized interstate, the states are divested, substantially, of their regulatory power. In this situation, a shipper or locality seeking the removal of undue prejudice which exists against one state rate, to the undue preference and advantage

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[1] Montana Rates and Fares, 60 I.C.C., 61, 66.

of another state rate, has no remedy before the state forum, because any proper action taken by that body to remove the discrimination would involve a violation of the injunction laid against its orders in the Federal court. In this manner the residual sovereignty of the state, declared expressly in its Constitution, and expressly reserved "to the states respectively, or to the people" in the Constitution of the United States, and the administrative powers conferred upon its duly accredited regulatory bodies, by laws enacted in pursuance thereof, stand nullified. In these states, if the right of the state shipper or locality is preserved, the remedy must be sought before the Federal forum. On the other hand, the powers of regulatory bodies in those states which granted the application of the carriers for increases in state rates equivalent to those authorized interstate, are preserved in full force and vigor, and may be exercised, provided that in so doing the resulting state rates, fares and charges do not create discrimination against interstate commerce.

Reference is made to the State Cases decided by the Interstate Commerce Commission, under authority of recent amendments to the Interstate Commerce Act, to indicate the extent to which construction may extend a power of Congress. These cases eventually will be reviewed by the Supreme Court, but a reversal of the Commission's decisions by that tribunal appears unlikely.

While it is clear that the principles of the Commerce Clause, as construed by the Supreme Court, have been correctly applied by the Commission to the subject matter upon which it acted, yet it is not difficult to understand that the members of the Constitutional Convention, in leaving the Commerce Clause to future determination, were not cognizant of the fruits which their labors would bring forth.

I

THE COLONIAL PERIOD

Introductory:

Many factors have served to mould our Union as it now exists, under the Constitution. The New England Confederation of 1643, the Albany Plan of Union of 1754, the Stamp Act Congress of 1765, The First Continental Congress of 1774, the Annapolis Convention of 1786, and the Constitutional Convention of 1787 formed stepping stones to our Federal Union and Constitutional form of Government.

During the Colonial Period, the power of regulating the foreign and domestic commerce of the Colonies rested largely with the British Government. The Colonies were, however, permitted to enforce certain classes of regulations of their own making, provided they did not conflict with the policies of Britain. These policies were founded upon the mercantile system, which flourished in Europe during the settlement and development of the English Colonies in America. The predominating characteristics of this system were based upon a belief that wealth consisted of money, i.e. gold and silver, and that these precious metals could be brought to and retained by a country only through a favorable balance of trade, i.e. by an excess of exports over imports.[1] Accordingly efforts were put forth to stimulate domestic industry, in order to increase exports and curtail the importation of foreign goods for consumption.

With these considerations in view, the British Government sought, consistently, to limit industry in the Colonies to the production of such raw materials as could not be obtained in abundance in England. Manufactures in the Colonies were dis-

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[1] Wealth of Nations (Adam Smith) III, 104.

[illegible]

[illegible]

[illegible]

couraged because similar articles were produced in England for export, and the raw materials available in America were, in many cases, needed by the British Manufacturers. In order, however, to stimulate the movement of certain commodities from the Colonies to England bounties were offered by the mother country for their importation.

The British Government regarded its Colonies primarily as legitimate sources of profit, their trade, generally speaking, being reserved to its merchants.

Early British Restriction of Colonial Exports.

Almost from the inception of Colonial commerce there arose disputes with the British over its regulation. The Colonies always conceded their allegiance to the Crown, but denied their subjection to Parliament in certain respects;[1] they admitted, generally, that the regulation of commerce, even by the imposition of duties, was properly vested in the British Government, but they opposed resolutely all attempts to tax them or destroy their manufactures and commerce, under the guise of regulation.[2]

In the original charters granted to Virginia and some of the New England Colonies, temporary exemptions from the imposition of duties, either on exports or imports were granted for limited periods.

Shortly after tobacco was imported from Virginia into England, heavy duties were laid upon it by the British Government. Accordingly in 1621, the Virginia Company shipped its tobacco to Holland. As this caused a diminution of the revenues of the Kingdom, by the non-receipt of the duty, as well as a substantial loss of shipping, which went to the Hollanders, an order of the

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[1] Mass. State Papers, edit. 1818, 342 to 365, 384 to 396; 1 Pitk. Hist. 250, 251, 453, 454.
[2] 1, Chalmers Annals, 452, 460.

King and Council, designed to prevent its repetition, was issued to the effect that no tobacco, or any other product of the Colonies should thereafter be carried into foreign ports until they were first landed in England and the customs paid.[1] This was the beginning of a system of commercial monopoly, later enforced by Acts of Parliament, which, with other causes, culminated in the American Revolution.

The New England Confederation.

Originally the American Colonies had no political connection, one with the other. While they had a common allegiance, each Colony was, to a limited extent, Sovereign within its own bounds. In this situation, union could be produced only by the existence of mutual desires and interests, in all the Colonies. As long as the Colonies were contented under British rule and nothing happened to disturb their domestic affairs, they were destined to remain separated. The gradual movement of the American Colonies, from a state of dependency, to their present high position as integral parts of one of the world's great Nations, developed from situations requiring unanimity of action among them. In 1643, there occurred the first American coalition, the New England Confederation, composed of the Colonies of Massachusetts Bay, Plymouth, Connecticut and New Haven. The motive was protection against the Indians, who were combining, and the Dutch at New Amsterdam. Articles of Confederation were entered into, providing for a firm and perpetual league, offensive and defensive.[2]

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[1] Political and Civil History of the United States (Pitkin) Vol. I, 93.

[2] History of the American Colonies (Marshall) 112.

The Navigation Acts

In 1644, during the contests between the King and Parliament, the sympathies of the New England Colonies were openly and avowedly expressed for the latter. In recognition of this fact, Parliament exempted all merchandise exported to or from the New England Colonies from all "duties or other customs." In 1645 Parliament exempted New England from the payment of all taxes "until both houses should otherwise direct". In the following year, the Colonies were exempted from all taxes except the excise "provided their productions should be exported only in English bottoms".[1]

As the orders of the King and Council, restricting the shipment of tobacco and other commodities to the ports of the mother country were not rigidly enforced, particularly in the Charter and Proprietary Colonies, the vessels of Holland, at that time England's most successful commercial rival, continued to carry a considerable part of the produce of the Colonies. This condition appears to have been directly responsible for the Navigation Act of 1651, which was intended to guarantee protection to English shipping. It provided substantially, that goods of the growth or manufacutre of Asia, Africa or America could be imported into British territory only when transported in English ships manned chiefly by English seamen; that goods of the growth or manufacture of Europe could be imported into British territory only when carried either in English vessels or those of the nation in which such goods were grown or manufactured; that goods of foreign growth or manufacture must be brought directly from the country in which they were produced, or from those ports through which such goods were customarily exported.

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[1] History of the American Colonies, Marshall, 117.

In theory at least this act did not give Great Britain a monopoly on Colonial trade; it merely forced the traders and producers of other countries to use their own or English bottoms.[1]

In 1660 the Navigation Act was reenacted, in more restrictive form. It provided in substance that goods might be imported to or exported from the Colonies only in ships built or owned in England, sailed by an English master, and with a crew three-fourths of whom were English; and that Colonial tobacco, cotton wool, indigo, ginger and dyeing woods might be shipped only to England and other British possessions.[2] Grain, salt provisions and fish were not enumerated for obvious reasons. Their importation into England would have brought them directly into competition with similar commodities produced there. Hence Parliament was willing to have them exported to other markets. When first enacted, the commodities enumerated were produced mainly in the Southern Colonies. Subsequently the list was supplemented from time to time by the addition of molasses, tar, pitch, turpentine, hemp, masts, yards, bowsprits, copper ore, bar and pig iron, pot and pearl ashes, whale fins, hides, rice, beaver skins and other furs, coffee, pimentos and coconuts. Eventually, the principal products of all the Colonies were restricted to markets in British possessions.

In 1663 Parliament completed its system for the restriction of Colonial trade to Great Britain. This act dealt with trade to the Colonies and provided that goods of the growth or manufacture of Europe, with certain minor exceptions, intended to be imported into English Colonial possessions must first be shipped to England or Wales in English-built ships, of which the master and three-fourths of the crew were English, landed, and then transported to their Colonial destinations in like manner.[3]

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[1] American Commercial Legislation before 1789 (Giesecke) 4.
[2] Ibid, 4,5,6.
[3] History of the American Colonies (Marshall) 142.

This act restricted purchases of the Colonies to British markets.

In 1672, Parliament enacted that certain Colonial products, including sugar, tobacco, indigo and cotton wool, when carried from one Colony to another, should be subjected to custom duties equivalent to those which would have been paid if the same commodities had been taken to England.

These commercial restrictions were a continual source of controversy and irritation between the Colonies and the British government. While enforced in the Middle and Southern Colonies, they were evaded upon every possible pretext by the New England Colonies.[1] This condition, and the disputes which arose subsequently under it, actuated Massachussetts in its efforts, first of all the Colonies, to throw off the British yoke.

The Colonial product most seriously affected was tobacco. Since 1624 the growth of tobacco in the British Kingdom had been prohibited except in Virginia and the Somers Isles; and heavy duties were laid upon the importation of Spanish tobacco into England. But Virginia produced more tobacco for export than was consumed in England and Ireland, and so, necessarily, sought a market for the surplus on the continent of Europe. The Act of 1663 required tobacco destined to the continent to be landed in England, thus increasing the cost of delivery by the expense of warehousing in England and higher freight charges for the two shipping movements, added burdens which were borne chiefly by the Colonists.

Creation of the Board of Trade and Plantations.

Most of the charter Colonies, except Connecticut and Rhode Island, were required by their charters to forward their legislative enactments to England, within certain periods, for approval

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[1] 1, Chalmers Annals 277, 280, 407, 440, 443, 448, 452, 460, 462, 639, 698. Hutchinson's State Papers, 496.

or disallowance by the Crown. Commercial laws of the Colonies were disallowed, either because they were considered to be technically illegal, i. e. exceeded the powers of the legislature or were badly formulated, or because they were deemed contrary to English law and interests. The Crown disallowed so many of the tariff acts of the Colonies that at one time instructions were issued to the Colonial governors requiring such enactments to include a clause suspending their operation until approved.[1]

Prior to 1696 the business of the American Colonies was attended to by committees of the Privy Council. In that year the Board of Trade and Plantations was established, with power to "inquire into the condition of the plantations, as well with regard to the administration of government, as in relation to commerce, and how these Colonies might be rendered more beneficent to this Kingdom."[2] Thereafter, the legislative acts of the Colonies were passed through this board, and its recommendations were usually adhered to.

At the outset, the Board of Trade and Plantations outlined its general policy to be that "of not allowing the legislatures in the American Colonies to pass laws by which the trade and shipping of this Kingdom may be affected, either by being subjected to duties or taxes or otherwise cramped or restrained."[3] Under this policy, acts of Pennsylvania and Virginia increasing the import duty on slaves, were disallowed.[4] In addition to action by the Board of Trade, Colonial governors were instructed to suspend laws which appeared to be prejudicial to English interests, pending their transmittal to England for final de-

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[1] Revolt of American Colonies, Chalmers, II, 75, 76.
[2] Annals of Commerce (McPherson)Volume II, 681.
[3] Pennsylvania Stats. L. VI, 610.
[4] Hening, Statutes of Virginia, VIII, 337; Pennsylvania, Stats. L., VIII, 619, 620.

cision. Frequently these directions were ignored by Governors, in preference to antagonizing the Colonial legislatures, from whom they received their pay. About the same time Parliament passed legislation requiring Colonial governors to be sworn to the enforcement of the Navigation Acts, heavy penalties being provided for their failure so to do; and granted authority to customs officials in the Colonies to search and seize vessels, suspected of importing goods illegally, in the same manner that similar officers were empowered in England.

Prohibition laid by Parliament on the Exportation of Rice

Many of the prohibitions upon the exportation of commodities from the Colonies to territory other than that of Great Britain were laid at the instance of interested Englishmen who conceived that they were injuriously affected by that trade. The details underlying the prohibition on rice show the flimsy evidence upon which some of these regulations were based. The captain of an English Vessel was unable to secure a cargo of Carolina rice for movement to England because of the large number of vessels in the same port loading cargoes of the same commodity for Portugal. Upon his return to England, he represented to a member of Parliament that it was detrimental to the trade of England that rice should be permitted to be exported directly from Carolina to Portugal or any other foreign country. Accordingly, rice was secretly included among the prohibited commodities in 1706, by an act of Parliament styled "An Act for granting to her Majesty a further subsidy on wines and merchandise imported", to which it was wholly unrelated. In this clandestine manner, the export market for Carolina rice was confined to British territory, thus causing the Colonial growers the loss of the Portuguese market until 1730, when it was allowed to [illegible]

lowed to be exported to any part of Europe, south of Cape Finisterre.[1]

The Molasses Act

The Colonies, particularly those of New England, during the first part of the eighteenth century were engaged in an extremely lucrative trade with the French, Spanish and Dutch West Indies, which enabled them to secure gold and silver with which to meet the unfavorable balance always held against them by England. The Colonists exported fish, lumber, grain, horses and cattle to these islands, and in return, received imports of rum, molasses and sugar from them. It being represented to Parliament by the sugar interests of the British West Indies that this trade was inimical to their industry, that body in 1733 passed the celebrated Molasses Act.[2] This act merely laid duties on the importation of rum, molasses and sugar into the Colonies from foreign countries. The duties were, however, so heavy that their enforcement would have prevented the importation of those commodities, and resulted in the cessation of trade of great importance to the Colonies. If the Colonies were unable to dispose of their produce to advantage, they could not secure necessary moneys with which to meet their unfavorable balance of trade with England. Hence, the Commercial Colonies sought, by every possible means, to evade the provisions of that obnoxious piece of legislation. Although orders were issued, from time to time, for its strict enforcement, this was never done.

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[1] Political and Civil History of the United States (Pitkin) 100.

[2] American Commercial Legislation before 1789 (Giesecke) 6.

The Stamp Act

The idea of a stamp tax, which resulted, eventually, in the enactment of the Stamp Act of 1764, originated in America. In 1739 a plan of this character was recommended by a club of Colonial Merchants, headed by Sir William Keith, governor of Pennsylvania.[1] The idea was not considered seriously by the British government until 1754, when the condition of affairs in America caused its temporary abandonment.

The close of the French and Indian wars found the British government with a large war debt on its hands, and a disposition on the part of the Grenville ministry to create a revenue in the Colonies by some form of tax which would, in part at least, liquidate the debt. The English considered that having incurred the burden in defense of the Colonies, they might rightfully call upon them to pay it. The Colonies, on the other hand, having contributed heavily in men and materials toward the victory which was to result, eventually, in the disappearance of France as a power in the New World, felt that they had done enough toward the establishment of British Colonial ambitions, and should not be taxed further.

In 1764 action was taken by Parliament for the purpose of laying new Colonial duties and remedying the laxity which prevailed in the enforcement of the existing Acts of Trade. The additional duties and new regulations provoked a storm of disapproval in the Colonies. The Molasses Act having been successfully evaded, the British now proposed to take active steps effectually to suppress the commerce which had been carried on in secrecy with the French, Spanish and Dutch West Indies with such lucrative retults. To that end, all British naval offi-

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[1] History of the American Colonies (Marshall), 354.

cers located in America were required to be sworn and act as customs officers. Many seizures were made and penalties and forfeitures under the law were recoverable only in the Vice-Admiralty Courts.[1]

While these new measures bore heavily upon the Colonies, smuggling continued unabated, and the anticipated revenue was not forthcoming. Along with the resolutions upon which the new duties and the stringent resolutions of 1764 were based, Parliament had declared that it would be proper to impose stamp duties in the Colonies for revenue purposes. In response to the critical attitude of the Colonies toward the proposed measure, Parliament informed the Colonial agents that the stamp duty idea would be discarded, if the Colonists would suggest some form of taxation, calculated to return an equivalent amount of revenue, which might be substituted for it. As the agents refused to accept this alternative, Grenville brought his act for imposing stamp duties into Parliament.

The Stamp Act Congress

Early in 1765 the House of Representatives of Massachusetts passed a resolution suggesting the meeting of a Congress of delegates of the different Colonies in New York in October of the same year, and subsequently had circular letters forwarded to the various Colonial Assemblies for that purpose. At the time and place appointed, Commissioners of the Assemblies of Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland and South Carolina met, chose their chairman and proceeded to outline their grievances to the King in a series of fourteen declarations, of which but one dealt with the Stamp Act, and

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[1] History of the American Colonies (Marshall), 357.

that not wholly so. They took occasion to enumerate all those measures of Parliament which they conceived as being subversive of their rights and liberties. Three of the declarations related solely to British restrictions upon Colonial commerce and trade created by acts of Parliament theretofore but recently enacted.[1]

Revenue measures enacted by Parliament in 1767 and their effect.

In 1766, the Grenville star declined; Pitt, staunch defender of the Colonists' rights, became Prime Minister of England and the Stamp Act was repealed. While the news of the repeal of the Stamp Act caused great rejoicing generally throughout the Colonies, the same spirit did not prevail in all of them. In the commercial cities of the north, the regulations of trade were almost as odious as the Stamp Act.

In June of the following year Parliament laid new duties on glass, paper, paste-board, white and red lead, painters'

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[1] History of the American Colonies, Marshall, 360, 471:

"IX. That the duties imposed by several late acts of Parliament, from the peculiar circumstances of these Colonies, will be extremely burdensome and grevious; and from the scarcity of specie, the payment of them absolutely impracticable."

"X. That as the profits of the trade of these colonies intimately centre in Great Britain, to pay for the manufactures which they are obliged to take from thence, they eventually contribute very largely to all supplies granted to the crown."

"XI. That the restrictions imposed by several late acts of Parliament on the trade of these Colonies will render them unable to purchase the manufactures of Great Britain."

colors and tea, when imported into the Colonies. Great protest was caused by these new exactions, which were openly condemned as being for revenue purposes, and not as a matter of regulation. In 1768 the Merchants of Massachusetts, Connecticut and New York convened and drew up agreements not to import British goods. By the close of the following year, merchants in most of the Colonies had entered into non-importation agreements against the parent country. The inhabitants of Charleston, S.C., were so deeply inbued with this idea that they determined to discontinue commercial relations with Rhode Island and Georgia because those Colonies refused to commit themselves to the non-importation agreement. The attitude of Charleston was probably not without its effect, for shortly thereafter the two Colonies joined in the agreement. These agreements were intended to influence British manufacturers in favor of the Colonists and to develop Colonial manufactures. All united in making the agreements effective, under the leadership of committees elected by the people to superintend importations. On April 12, 1770 the duties imposed by the Act of 1767 were removed, with the exception of that on tea. Thereupon, the Colonists refused to drink British tea or permit its being landed safely in America.

The Boston Port Bill and other Coercive Legislation

The New England Colonies had never submitted obediently to the policies of Parliament. They had successfully evaded and dexteriously circumvented the resolutions and enactments of that body. When evasion and circumvention failed, they stubbornly refused to follow the dictates of Parliament. In every movement of the Colonies, having for its purpose the evasion or nullification of some resolution, regulation or law

of England, Massachusetts led and the other Colonies followed. Riots and the destruction of Tory property in Massachusetts followed the enactment of the Stamp Act. The Boston Tea Party in 1774 was the last straw. Parliament, determined to make such an example of Massachusetts that the other Colonies would be cowed into submission, passed the Boston Port Bill, prohibiting commercial intercourse with the port of Boston on and after June 1, 1774, and removing its custom house and customs officials to Salem. This bill was to remain in effect until reparation should be made to the East India Company for the tea thrown into the harbor and the King was convinced that the Bostonians were repentant. By another act, the charter of Massachusetts was rescinded and power vested in Parliament for the appointment of royal officials to direct the affairs of that Colony. Other acts provided for the quartering of troops at the expense of the Colonies and for the extra-judicial enforcement of criminal justice by arbitrary means.[1]

When the citizens of Boston received intelligence of the Port Bill, they met in solemn conclave and, after passing certain resolutions strongly indicative of their opinion of this latest act of tyranny, invited the other Colonies to join with them in non-trade agreements against the British Kingdom. The members of Parliament evidently had believed that the enforcement of coercive measures would divide the Colonies and dishearten Massachusetts, always the aggressor in the fight against British despotism. The effect was exactly the reverse. The other Colonies immediately espoused the cause of Massachusetts. Resolutions were adopted in almost every Colony deeply sympathizing with that colony. In Virginia, the House of Burgesses proclaimed a day of prayer and fasting on June 1, when the Port Bill was to become effective. For this resolution, they were

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[1] History of the American Colonies (Marshall) 402.

dissolved by the royal governor. Thereupon. they met in the long room of the Raleigh Tavern, formed an association, and asserted that an assault on one Colony designed to enforce submission to arbitrary measures was an attack on all of the Colonies, which would result in the destruction of their liberties, unless dealt with by united opposition. Accordingly, they recommended that the other Colonies consider the question of appointing delegates to meet in Congress annually for the determination of matters of common interest to all. Similar resolutions had previously been passed at town meetings held in New York and Boston.

When the bills enacted after the Port Bill reached Boston, an agreement was formulated styled " a solemn league and covenant", the signers of which bound themsleves to suspend all commercial intercourse with Great Britain beginning August 31, 1774, until the late obnoxious legislation should be repealed; they renounced, moreover, all intercourse with those who would not bind themselves similarly, and attached to this renunciation the penalty of proclaiming to the world, the names of those who declined to give this testimonial of their confidence in the rights of their country. In every Colony, resolutions were passed by the legislatures, or by representatives of the people assembled in convention when the legislatures were not convened, joining with Massachusetts in the substance of its non-intercourse agreement. In this manner the Colonies continued in a state of individual turmoil, until, united by common purposes, the representatives of twelve Colonies assembled on September 4, 1774 at Philadelphia in the first Continental Congress.

Restriction of Colonial Manufactures by the British

Great Britain, being committed to the Mercantile System, sought to confine industry in the Colonies to the production of raw materials, which might be manufactured in England and sold back to the Colonists in finished form. As the needs of the Colonists had, from the first, been supplied entirely by articles of English make, their manufactures would come directly into competition with those produced in the mother country. Being relieved of the burden of transportation, Colonial manufactures might very properly have displaced the sale in the Colonies of similar articles produced in England. Accordingly, at an early date, the British government took steps calculated to discourage Colonial manufactures. While this was made a definite governmental policy, its consummation was aided by English manufacturers, who complained frequently of trade losses due to the production of competing goods in the Colonies.

In 1699 Parliament directed that no wool, yarn or woolen manufactures should be shipped from the Colonies to England or any other place.[1] This was the beginning of restrictions on Colonial manufactures. Inquiries relating to Colonial manufactures were forwarded by the Board of Trade and Plantations to the various Colonial Governors and their responses transmitted to Parliament. Upon basis of an investigation of this character, the House of Commons asserted in 1719 "that the establishment of manufactories in the Colonies tends to render them more independent of Great Britain."[2]

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[1] American Commercial Legislation before 1789 (Giesecke) 7.
[2] Journals of the House of Commons, Vol. III.

In 1706 the Board of Trade and Plantations recommended that two acts of the Pennsylvania Assembly be disallowed by the crown.[1] One of the acts was designed to prevent the sale and use of ill-tanned leather for manufacturing shoes. The recommendation as to this act was made because "it cannot be expected that encouragements should be given by law to the making of any manufactures made in England in the plantations, it being against the advantage of England."

In 1731, the House of Commons directed the Board of Trade and Plantations to inquire and report "with respect to laws made, manufactures set up, or trade carried on detrimental to the trade navigation or manufactures of Great Britain." The Board reported that certain manufactures carried on in the Colonies, including wool, flax, iron, hats and leather, were injurious to English producers of similar goods. In 1732, upon complaint of English hatters, Parliament prohibited the shipment of hats manufactured in the Colonies, to any place, Colonial or otherwise, and laid certain restrictions upon the employment of labor by Colonial hatters. In 1750 Parliament prohibited the erection of rolling mills, forges or steel furnaces in the Colonies, under penalty of heavy fine.[2]

Not all of the British regulations were restrictive. Bounties were offered on a considerable number of commodities, principally raw materials, which British Manufacturers were forced to secure from foreign countries. The Colonies might have sold these commodities elsewhere, if their exportation had not been limited to England.

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[1] Pennsylvania Stats. L. II, 466, 480, 481.

[2] Political and Civil History of the United States, (Pitkin) Vol. I, 103.

Regulation of Commerce by the Colonies.

The government of the Colonies was of three different types, Royal, Charter and Proprietary. Charters enumerating certain privileges were granted to some of the Colonies, to be exercised through legislative assemblies. In the Proprietary Colonies, similar privileges were granted to the proprietors. The Royal Colony, which was the predominant type in the Eighteenth century, was more directly under the control of the Crown than either the Charter or Proprietary Colony. Disputes arose from time to time, between the Crown and the Charter Colonies, as to the extent of the authority of the legislatures, under their charters. These contests were so bitter that the Crown found it convenient at times to abrogate Colonial charters. In the Proprietary Colonies differences frequently arose between the people and the proprietors. From the view point of the Crown, the Royal type was the ideal Colony, owing to the difficulty of enforcing governmental policies in the Charter and Proprietary Colonies.

Parliament was paramount in all the Colonies, subject, however, to the exercise of those privileges granted to proprietors or by Charter. In the early Colonial days, the Royal Colonies generally complied with the regulations of Parliament, even though at times they were found to be extremely burdensome. Later, when Parliament endeavored to impose taxes, arbitrarily for revenue purposes, to meet the debt incurred in the French and Indian Wars, these Colonies joined with their neighbors in spirited opposition to those exactions.

The thirteen Colonies each had representative assembles, and enacted legislation independently of each other, which, in

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certain instances, was contrary to the policies of the British government and the laws of England. Colonial legislation relating to trade and commerce was enacted principally for revenue purposes, but to less degree also for the protection of commodities, the improvement of trade and the encouragement of ship building. Thus, it will be seen that the theory of protection to American producers antedates our government, having been first invoked by the Colonial assemblies.

The legislation of the Colonies concerning trade and commerce took the form of import, export and tonnage duties, bounties and port regulations.

Import duties imposed by the Colonies.

All of the Colonies except Delaware laid import duties upon commodities at various times, for longer or shorter periods. In Massachusetts, New York and South Carolina systems were developed which continued for considerable periods. At the outset, these duties were generally applied on an ad valorem basis, but subsequently specific duties became predominant, particularly in Pennsylvania, Massachusetts, New York and South Carolina.

Most of the Colonies laid relatively high duties on wines and spirituous liquors, which were essentially luxury taxes. The New England Colonies, in their trade with the West India Islands, imported large quantities of molasses, which was used in the distillation of rum. Higher duties prevailed in these Colonies on rum than on wines and other spirituous liquors, the motive probably being to protect the domestic product.[1] The articles commonly made subject to specific duties were wine and spirituous liquors, tobacco, sugar, cocoa, molasses, dye-

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[1] American Commercial Legislation before 1789 (Giesecke) 20.

woods and tea. Upon all other goods, with certain exceptions, ad valorem duties, seldom exceeding 5 per cent of first cost, were imposed.[1]

In the northern Colonies, lower duties were laid on goods imported directly to the legislating Colony from the place of growth or manufacture.[2] This was done to encourage the direct trade. In many cases these laws applied equally to England and thus violated the letter and spirit of the British acts of trade and navigation. Most of these violations occurred in the Charter and Proprietary Colonies. Occasionally, higher duties were imposed on goods transported overland from a neighboring colony than would have applied on the same commodities, if brought directly by sea. In 1716, Stephen Goden, a British Merchant, requested the Board of Trade and Plantations to revoke the charters of those Colonies in which the assemblies passed enactments repugnant to the laws of England. Thereupon, the Board, after due consideration, procured a royal order prohibiting royal governors from approving Colonial bills which related to English trade and shipping, until they had been passed upon by the Crown. In 1719 an act of the Pennsylvania legislature, passed in 1715, levying import duties on liquors and hops, was disallowed, upon the recommendation of the Board of Trade and Plantations that it "not only allows the importation of wines in general directly from the place of their growth, which is contrary to the act of trade, 15th Charles the Second, but lays a double duty on wines as may be imported from any other place, which can be only Great Britain."[3] In 1731 the Board reported

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[1] Acts of the General Assembly of Georgia, 1755-1774, 242; Records of Rhode Island, III, 422; Cooper, Statutes of South Carolina, II, 649.

[2] Colonial Laws of New York, I, 165, 403; American Colonies, Osgood, II, 359; Acts and Resolves, Massachusetts II, 11, 48, 76.

[3] Pennsylvania, Stats. L. III, 465.

that the Colonies imposed lower duties "on their own effects", than upon those of residents of England.[1]

Slaves were considered merbhandise, under the navigation acts, and accordingly duties were imposed upon their importation, chiefly as a means of securing revenue, although at times the motive of checking their influx into the Colonies was also controlling. The slave trade was extremely lucrative, being carried on by companies which operated under the authority of, and had the support and encouragement of the Crown. Accordingly, the Board of Trade and Plantations consistently recommended the disapproval of acts of the Colonial legislatures laying duties on slaves, when the duty was borne by the importer, usually an English merchant or lower duties were paid by merchants of the legislating Colony.

Such violations of English law as resulted from Colonial regulations were not intended primarily to prejudice the interests of British merchants, but rather to provide necessary revenue with the least burden to Colonial merchants.[2] No doubt, at times other motives contributed to influence legislation against the slave trade, particularly in the closing decades of the Colonial status, when there was a strong tendency toward its restriction or even total prohibition.[3] The regulations of some of the Colonies were intended to safeguard the moral welfare of their inhabitants. This was true of a duty laid on rum by North Carolina in 1751.[4]

Some of the Colonies adopted the policy of providing lower duties on articles when imported in vessels of the legislating Colony. This was done by Pennsylvania, Connecticut, Virginia,

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[1] Revolt of the Colonies, Chalmers, II, 118.
[2] Revolt of the Colonies (Chalmers) II, 6,7, 118-120.
[3] Suppresion of the Slave Trade (Du Bois), 39, 41.
[4] State Records of North Carolina, XXIII, 363.

Maryland and South Carolina.[1] The most important of these acts were imposed by Connecticut and Pennsylvania on rum and wine.

At times, individual Colonies passed acts levying discriminatory duties upon commodities when imported from certain other Colonies. Usually this character of legislation was adopted as a method of commercial coercion, when a boundary dispute could not be settled amicably. In 1704 during a controversy over the boundary line between Maryland and Pennsylvania, the former Colony provided a duty on liquors imported from the latter, of three times that laid when similar goods were imported from other places. This measure continued in force for twenty years thereafter. As a result of the same dispute, Maryland also prohibited entirely the importation of tobacco, provisions, beer, malt and horses from Pennsylvania.[2] Similar legislation was enacted as the result of a boundary disagreement between Maryland and Virginia.[3]

In a number of cases, Colonies laid import duties to balance similar duties imposed on their goods by other Colonies. In 1721 Massachusetts imposed import and export duties on goods in trade with New Hampshire, in retaliation of certain duties established by the latter Colony.[4] This was one of the few acts in which duties on exports were laid by Massachusetts, and it was repealed shortly after its enactment.

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[1] Pennsylvania Stats. L. III, 363; Public Records of Connecticut, IX, 283; Cooper, Statutes of South Carolina, II, 200; III, 32,67; Henning, Statutes, III, 23, 88,129; Bacon, Laws of Maryland, Chapter 10.

[2] Bacon, Laws of Maryland, 1704, Chapters 30 and 43; 1715, Chapter 36.

[3] Tariff controversy, (Elliott), Leland Stanford Jr., University Monographs, 1892, 17.

[4] Acts and Resolves, Massachusetts, II, 230.

Export duties imposed by the Colonies.

Export duties were not laid as generally by the Colonies as import duties. Rhode Island and Delaware never imposed such duties. Their enactment by Massachusetts and some of the other northern Colonies was confined to one or two minor instances, for short periods. With the exception of New York, none of the New England or Middle Colonies laid duties on exports after 1750. These regulations were confined chiefly to New Jersey, Maryland and Virginia. They were imposed primarily for revenue purposes, the commodities most commonly taxed being tobacco, skins, furs and lumber. Their imposition on raw materials was, in some instances, intended to encourage domestic manufactures and industry. This was true of acts passed by the assembly of New Jersey in 1714 and 1725, levying export duties on wheat, to promote the domestic production of flour.[1] Laws of the same Colony relating to staves and other forms of timber, were designed to encourage the manufacture of casks.[2] In other cases, similar duties were provided for to retain necessary commodities in a Colony for local consumption. In Maryland, laws of this character were passed in 1695 and 1696, imposing duties on European goods which were reexported.[3] This expedient for restrainimg the exportation of commodities was not resorted to frequently, the more usual method being by embargo.

Export duties, as a source of revenue, were important in the Southern Colonies, particularly Maryland and Virginia. From the earliest times, tobacco constituted the principal crop in Maryland and Virginia. In Maryland the first duty on the

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[1] New Jersey Archives, IV, 196.
[2] New York Colonial Documents, V,767.
[3] Bacon, Laws of Maryland, 1695, Chapter 24; 1696, Chapter 9.

exportation of tobacco was imposed in 1649, being 5 per cent, unless exported to England, Ireland or Virginia.[1] Similar acts were passed, from time to time, varying the volume of the duty, until the Revolution. One of these laws, passed in 1671, contained a provision that a portion of the duty collected on tobacco should be reserved to the proprietor, on condition that he would accept tobacco at two shillings per pound in lieu of quit-rents and alienation fines. For many years this provision proved a fertile source of dispute and irritation between the Assembly and the proprietor.[2]

In Virginia, the earliest duties were laid on tobacco not exported directly to England in English Vessels. At that time, Virginia being a dutiful colony, laid the duties for the purpose of imposing a disability upon the shipping of Holland, which was England's most successful commercial rival. The subsequent acts of Virginia, exempting its ship-owners and those of the New England colonies from the payment of these duties, indicate that this was the motive behind the original legislation.[3] Duties were not laid by Virginia on the exportation of tobacco, for revenue purposes, until 1658.[4] Acts changing the export duty on tobacco were passed from time to time down to the Revolution, when the duty then in force was repealed.[5] Virginia was permitted by England to apply a portion of these duties to the support of William and Mary College.[6]

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1 Bacon, Laws of Maryland, Chapter 2.
2 Maryland Archives, Proceedings of the Assembly, 1666-1676, 255-258; Mereness, Maryland, 346-348.
3 Hening, Statutes, I, 537; II, 133,218.
4 Hening, Statutes, I, 491.
5 Hening, Statutes IX, 162.
6 Hening, Statutes, VI, 92.

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Export duties on lumber were provided for, at different times, by six Colonies. These measures while enacted for revenue purposes, also had behind them the motive of encouraging home industry, as all the Colonies which laid them were adjacent to ship building and coopering centers except South Carolina. However, the duty on timber was laid by South Carolina at a when that Colony had established other measures calculated to foster its shipping.[1]

The most active of the Colonies in laying export duties on lumber was Connecticut. The chief purpose of the regulations of that Colony was the encouragement of trade with the West Indies. Another minor influence behind its legislation was the restriction of its standing timber to its ship building and coopering interests. The revenue-producing aspect was not controlling. The first act was passed in 1673, laying relatively heavy duties upon a large variety of lumber. Subsequently, in 1714 and 1715, duties were imposed on timber exported to Massachusetts Bay, New York, New Jersey, Rhode Island and New Hampshire.[2] The primary purpose of these acts was to encourage the trade of inhabitants of the Colony with the West Indies, and to restrain the movement of lumber to foreign ports through the neighboring Colonies.

The acts of New Jersey, levying duties on lumber articles were prompted by a desire to protect its standing timber from unnecessary waste. The duties on export lumber provided by New Hampshire, Massachusetts and Plymouth, were revenue measures solely.

Eight Colonies imposed export duties on skins and furs. In Georgia, North Carolina and Pennsylvania these were the only

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[1] Cooper, Statutes, II, 200.

[2] Public Records of Connecticut, V, 434, 499; IX, 286.

commodities upon which such duties were laid.[1] The earliest Colonial duties, except in New York, were designed to restrict the exportation of furs. Subsequently, they were intended primarily for revenue purposes. The interest of New York in the fur trade was probably greater than that of any other Colony. The inhabitants of that Colony, during its occupation by the Dutch, had engaged in a thriving and extensive fur trade with the Indians, which was continued when the English took possession in 1664. Duties were imposed by the Dutch at an early date, and were continued by the English.[2]

Colonial Bounties

The practice adopted by England, of granting Colonial bounties, has been referred to. All of the Colonies except Delaware offered bounties for the production of certain articles as a means of increasing trade and commerce. The most noteworthy bounties were granted by the New England Colonies, Virginia and South Carolina. In the Northern and Middle Colonies, bounties were confined almost exclusively to those offered for the encouragement of the production and manufacture of hemp and flax. Virginia and South Carolina, on the other hand, offered, in addition, bounties on numerous other commodities. The British government desired the Colonies to produce commodities which would provide means to pay the balances due the mother

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[1] Laws, Pennsylvania, 1682 to 1700, 138; State Records of North Carolina, XXIII, 613; Watkins, Digest of the Laws of Georgia, 149, 180.

[2] Laws and Ordinances of New Netherland, 154, 172; New York Colonial Documents, V, 775, 778, 781, 782; Journal of the Council of New York, I, 591.

country for its manufactured articles, and yet would not compete with English manufactures. Accordingly, from time to time, the Colonial governors urged the Colonial legislatures to grant bounties on certain articles.[1]

The English manufacturers required hemp and flax. Hence the British government offered bounties for the exportation of these commodities from the Colonies. Notwithstanding this fact, the quantity of hemp exported to England was comparatively small. These articles were, however, of considerable importance in several of the Colonies, and the probability is that the Colonial bounties were beneficial in increasing the quantity for domestic production.

Silk was one of the most prominent of the commodities for the production of which bounties were offered. Connecticut, New Jersey, South Carolina, Georgia and Virginia endeavored in this way to promote its production.[2] Virginia in 1662 offered the first Colonial bounty for silk production.[3] As the first bounties did not produce the anticipated results, the Assembly finally offered ten thousand pounds of tobacco for every fifty pounds of silk produced. In Georgia large expenditures were made for the purpose of encouraging the silk industry, but here, as elsewhere, the results ended in failure. Filatures were established, experts secured, machines, trees, seed and silkworm eggs furnished, and liberal bounties offered by the proprietors. At one time, one of the prerequisites to membership

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[1] Votes of the Assembly of Pennsylvania, III, 6, 7, 128, 129; Journal of the Council of New York, II, 1540, 1544; New Jersey Archives, 1st Series IX,491; XXIV,542,555.

[2] Public Records of Connecticut, VII,494,495; Allison, Acts of the Assembly of New Jersey, 281; Cooper, Stats. (South Carolina) III, 436,613; Colonial Records of Georgia, VI, 324; Hening Stats. of Virginia, II, 121.

[3] Hening, Stats. of Virginia, II, 121.

in the Assembly of that Colony was the cultivation of one hundred mulberry trees; after 1753, each member was required to maintain in his family one person competent in the art of reeling silk, and to produce fifteen pounds of silk for every fifty acres of his land.[1] Some silk was produced in Georgia and South Carolina but by the time of the Revolution the industry had disappeared, even in these Colonies.

Bounties on wheat, flour and salt were offered in several of the Colonies where those staples were required, but not produced. Massachusetts, Virginia, Georgia and South Carolina granted bounties at different times, upon the production of wheat and the manufacture of flour.[2] Bounties on salt were given by Virginia and South Carolina. After 1663 this commodity could be imported into the Colonies directly from foreign countries other than England.[3] As the Colonies imported their very necessary supply of salt, the general method of stimulating its importation was by exemption from import duty.

Shipbuilding, while an important industry in New England, was not carried on to any great extent in the Middle and Southern Colonies. In order to encourage their shipping interests, Virginia, South Carolina, New York and New Jersey offered bounties for the construction of vessels. The efforts of Virginia achieved a small measure of success, but those of the other Colonies were wholly unproductive.[4] Bounties for the production

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[1] Colonial Records of Georgia, VI, 181,320,323,325,390,407; Jones History of Georgia, I, 433,434; Bishop, History of Manufactures, I, 357.

[2] Acts and Resolves, (Massachusetts) IV, 527; Cooper, Stats. (South Carolina), III, 613, IV, 327; Hening, Stats. (Virginia) I, 469; II, 123; Watkins, Digest of the laws of Georgia, 156.

[3] 15 Charles II, Chapter 7.

[4] Hening, Stats. (Virginia) II, 122, 178, 204, 242, 516; Cooper, Stats. (South Carolina) III, 742; IV, 10; Journals of the Council of New York I, 661, 731; New Jersey Archives, 1st Series XIII, 433, 463.

of numerous other commodities were offered by different Colonies. South Carolina granted bounties on wine and indigo in 1694, and upon wine and olive oil in 1744. Results were achieved in the case of indigo, which within a few years became the second staple of that Colony.[1]

In addition to bounties for production, some of the Colonies granted bounties for the exportation of commodities. While bounties upon production tended to increase foreign trade indirectly, bounties upon exportation were designed to accomplish that result directly. This class of legislation was confined almost exclusively to Virginia, North Carolina and South Carolina. In 1722 Virginia provided export bounties on hemp and tar.[2] In 1764 North Carolina offered bounties on hemp, flax, pot and pearl ashes.[3] South Carolina granted bounties on salt petre and potash in 1707,[4] and on hemp, flax, cotton, ginger and indigo in 1744.[5] In 1754 New Hampshire offered a bounty upon tar.

As England required large quantities of naval stores during the early part of the eighteenth century, the British government granted bounties upon the Colonial production of those commodities, eliminated duties upon their importation from the Colonies, and restricted their exportation by the Colonies to British possessions. Virginia, North Carolina, South Carolina and New Hampshire reciprocated in part, Virginia, North Carolina and South Carolina, by granting bounties on hemp, and Virginia and New Hampshire, by granting bounties on tar. These measures were practical failures, as the Colonies did not produce enough

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[1] Trott Laws of South Carolina, 34; Cooper Statutes, III, 615.
[2] Hening, Statutes IV, 96; VI, 144; VIII, 363.
[3] State Records of North Carolina, XXIII, 923.
[4] Cooper, Statutes of South Carolina, II, 307, 385.
[5] Cooper, Statutes of South Carolina III, 615.

of the commodities in question to supply their own demands. Apparently, the only successful export bounty, in a practical sense, was that granted on indigo. Its cultivation increased to such an extent that after two years the bounty was eliminated, being no longer necessary.

The Colonies, in order to maintain the reputation of staple commodities in foreign markets, generally provided for their inspection upon tender for export. The inspection of lumber and meat prevailed in all of the Colonies. In New York and the New England Colonies, the inspection of fish was regularly provided for.[1] In New York, New Jersey, Pennsylvania and Maryland flour and bread were inspected.[2]

Tobacco was practically the sole product of Virginia, and the principal single commodity exported from all the Colonies. Inspection was provided by law in Connecticut, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia. The regulations of Maryland and Virginia were quite detailed and rigorously enforced. Tobacco of inferior quality was rejected and could not be exported. In Virginia as a further precaution the shipment or sale of North Carolina tobacco was prohibited by law.[3]

In the New England and Middle Colonies, the casks in which liquors were shipped, were required to be gauged.[4] In the

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[1] Public Records of Connecticut, III, 417;
Acts and Resolves (Massachusetts) I,49; II,286,379,601.

[2] Pennsylvania Archives, 4th Series, I, 475.

[3] Bacon,Laws of Maryland, 1763,Chapter 18;
Hening Stats. of Virginia. II,445;
Bruce Economic History of Virginia,I, 304-308;
Hawk,History of North Carolina,II, 234; Mereness,Maryland, 110-117.

[4] Colonial Laws of New York, I, 58;
Whitmore,Colonial Laws of Massachusetts, 16;
Batchellor, Laws of New Hampshire, I, 197;
Public Records of Connecticut, III, 417; X,129;
Acts and Resolves of Massachusetts, II, 49;
Acts and Laws of His Majesty's Colony of Rhode Island (1752), 101.

Southern Colonies, Massachusetts, New York and Connecticut, naval stores were inspected. Among other commodities, on which inspection was provided by law in different Colonies at various times, were butter,[1] flax,[2] indigo,[3] grain,[4] leather,[5] malt[6] and rice[7].

Considered in their entirety, these regulations contributed beneficially to the commerce and trade of the Colonies, by maintaining a high standard of excellence in commodities exported. While laxity existed in their administration in some Colonies, taken as a whole, they constituted a deterrent to the exportation of inferior goods, which redounded to the benefit of conscientious producers.

Colonial Tonnage Duties

Tonnage duties, or "powder money", were levies imposed on vessels calling at ports of the Colonies, computed upon basis of their tonnage. They were laid generally by all of the Colonies except Delaware and New Jersey. At first powder was accepted, in lieu of money, in settlement of these levies, which caused them to be known as "powder money". Originally, they were imposed, primarily, as revenue measures, being used in providing and maintaining fortifications for the defence of the

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1 State Records of North Carolina XIII, 485.
2 State Records of North Carolina, XXIII, 639,790;
Colonial Laws of New York, V, 361;
Watkins, Digest of the Laws of Georgia, 159.
3 Cooper, Statutes of South Carolina, III, 718.
4 Allison, Acts of the Assembly of New Jersey, 71, 3[illegible].
5 Colonial Laws of New York, V, 71;
Hening, Statutes of Virginia, III, 75;
Whitmore, Colonial Laws of Massachusetts, 88;
Records of Rhode Island IV, 7;
Watkins, Digest of the Laws of Georgia, 149.
6 Acts and Resolves (Massachusetts) II, 447.
7 State Records of North Carolina, XXIII, 432,435,639,790;
Cooper, Statutes of South Carolina, III, 497.

Colonies. Subsequently, the revenues derived from tonnage levies were expended in the establishment and upkeep of lighthouses, beacons and buoys.

While the tonnage duties were laid to provide revenues, they also served the purpose of encouraging shipbuilding and trade, by means of exemptions to vessels of the legislating Colony. This was a matter of great importance to the New England Colonies, which owned the bulk of Colonial vessels. Where exemptions did not apply equally to British ships, English merchants complained to the Board of Trade and Plantations, which, in many cases recommended the disallowance of discriminatory acts.

Colonial Port Regulations

Numerous important and essential port regulations provided by Great Britain or the Colonial Governments were in force in the Colonies. Ports of entry were established, at which the British and Colonial customs officers were located. The number of ports of entry in the different Colonies varied according to their grographical location. In 1663 Massachusetts established three customs districts.[1] In 1659 Connecticut provided nine ports of entry which in 1702 were reduced to eight.[2] In 1668, the Governor of Maryland limited the number of ports of entry in that Colony to twelve.[3] In 1683 the ports of entry in that Colony had increased to 31, and by 1689 they numbered fifty seven.[4] Virginia attempted, unsuccessfully, to

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[1] Whitmore, Laws of Massachusetts, 139,140.
[2] Public Records of Connecticut, I, 332; III,307.308;IV,374,397.
[3] Maryland Archives,Proceedings of the Council,1667-1687, 31,32.
[4] Maryland Archives, Proceedings of the Assembly, 1678-1683, 352,488,492,540.

make Jamestown the sole port of entry. This was impracticable in a plantation Colony. North Carolina had no good ports, and considerable of its early commerce moved through Virginia and South Carolina. South Carolina and Georgia had a limited number of ports of entry.

Massachusetts, Rhode Island and Connecticut adopted maritime codes, relating to shipping and seamen.[1] Quarantine regulations were enforced in most of the Colonies.[2] In Massachusetts, Delaware, Pennsylvania, New York, Georgia and South Carolina, the Colonial legislatures regulated wharfage charges.[3]

Administrative officials charged with the enforcement of the laws respecting trade and navigation were provided by the British government and by the Colonies. The number of such officials, their titles, the manner of their appointment and their specific duties differed widely in the various Colonies. In some of the Colonies, laws relating to the enforcement of the navigation acts were very meagre.[4] In others, more elaborate and specific acts were passed.[5] As a whole, the administration of the navigation regulations was lax and inefficient.

In order to insure proper collection of tonnage duties, vessels were required to be registered. Masters were required to furnish a sworn statement of the tonnage of their vessels.

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1 Whitmore, Colonial Laws of Massachusetts, 93-100;
Colonial Records of Rhode Island, I, 151.

2 Cooper, Statutes of South Carolina, III, 735;
Acts and Resolves (Massachusetts) I, 142;
Colonial Laws of New York, I, 345, 866;
Batchellor, Laws of New Hampshire, I, 80, 571, 691;
Colonial Records of North Carolina, II, 758, 762.

3 Whitmore, Colonial Laws (Massachusetts) 156, 157;
Laws of Delaware (1797) I, 481;
Colonial Laws of New York, II, 847; III, 437, 993;
Cooper, Statutes of South Carolina, IV, 286, 435;
Watkins, Digest of Laws of Georgia 159.

4 Pennsylvania Stats. L., II, 108.

5 Cooper, Statutes of South Carolina, II, 42, 64, 71, 73, 200.

It was customary for the master to state approximately two-thirds of the actual tonnage to the customs officer.

The public officers of ports, including British officials, were paid by fees authorized by the Colonial legislatures or by the governors. In Colonies where these fees were authorized by the Colonial Assemblies, officials charged with enforcing the British Acts of Trade and Navigation, were, in many cases, deterred from a strict performance of their duties to the British Crown, because they realized that the Assemblies had power to suspend their compensation. This accounts in great measure for the laxity in the enforcement of those acts in the New England Colonies.

In all of the Colonies except New Hampshire, Rhode Island, New Jersey and Maryland, systematic pilotage regulations were established by law. The Southern Colonies were particularly active in this respect. This was due to the fact that settlements in these Colonies, which were almost exclusively engaged in agricultural pursuits, were situated considerable distances inland, adjacent to tortuous and shifting streams, the navigation of which required the services of competent and experienced pilots. Originally, in New York and South Carolina, the governors were authorized to appoint pilots. Usually, however, Boards or Commissions were established to examine applicants for positions as pilots.[1] While the duties of pilots were generally provided by law, the Boards were permitted to establish minor regulations.[2]

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[1] Pennsylvania Stats. L., VII, 19;
Colonial Laws of New York, IV, 173;
State Records of North Carolina, XXIII, 355, 375;
Trott, Laws of the Province of South Carolina, 610;
Watkins, Digest of the Laws of Georgia, 75.

[2] Colonial Laws of New York, IV, 173;
Cooper, Statutes of South Carolina, III, 225,678,713;
IV, 431, Hening, Statutes of Virginia, VII, 580.

Pilotage fees were provided by law. In most of the Colonies pilotage was compulsory but during different periods it was optional, as to certain classes of vessels, in New York, Georgia, and South Carolina.[1] In some of the Colonies, one-half of the regular pilotage fee was required if the vessel refused the services of a pilot.

SUMMARY OF COLONIAL REGULATIONS

From an analysis of the Colonial regulations relating to commerce and trade, it is clear that there was no unity of purpose in the legislation upon basis of which they were established. Each Colony, in its quasi-sovereign relation to England, established such regulations as seemed likely to advance its interest. No uniformity existed, except so far as the regulations applied to Great Britain. In that sense the Colonial laws were only partially uniform, for many times the Board of Trade and Plantations was called upon to consider their disallowance, by virtue of discriminations against England. Frequently, conflicting legislation was not repealed until after it had been in effect for considerable periods. Thus, upon the separation from England and the establishment of union, the back ground was prepared for the struggle under the Articles of Confederation which eventually led to the adoption of the Constitution.

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[1] Colonial Laws of New York, I, 324, II, 302, 700, 949; III, 678, 753; IV, 173,278,337,523,652; Watkins, Digest of the Laws of Georgia, 75; Cooper, Statutes of South Carolina, III, 491; III, 713.

II

THE REVOLUTIONARY PERIOD

The Continental Congress

From its first meeting on September 4, 1774, until the adoption of the Articles of Confederation on March 1, 1781, the Continental Congress was a revolutionary body. This first Congress self-styled in its formal acts "the delegates appointed by the good people of these colonies"[1], proceeded in a manner calculated to compel redress by Britain of the grievances to their constituents without further widening the breach which had been created between the colonies and the mother country.

Non-importation Agreements Promulgated by Congress.

On October 14, 1774, the Continental Congress passed resolutions suspending the importation after December 1 of that year, of any goods whatsoever from Great Britain and Ireland, of East India tea from any part of the world, of molasses, syrups, coffee or pimentos, from the British West Indies, of wines from Madeira, of slaves and foreign indigo. It declared in no uncertain terms that the people of the Colonies would not thereafter be concerned in the slave trade, nor would they consume tea imported by the East India Company. They urged that all exports to British possessions should cease after September 10, 1775, "unless the grievances of American are redressed by that time"[2]. An association was formed by the members representing the twelve colonies, and on behalf of their constituents agreements of non-importation, non-exportation and non-consumption were signed, to carry into effect the resolutions which had been adopted[3]. Colonies which did not join in these agree-

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[1] Story on the Constitution, Vol.1, paragraph 200.
[2] Journals of Congress, 21.
[3] Georgia did not send delegates until July 15, 1775, and they were not seated until September 13, 1775.

ments were threatened with non-intercourse.

At this time the majority of the members of Congress cherished the hope that the union of the Colonies, the combined force of their opposition to the measures of Parliament, and the loss of trade by English merchants occasioned by the non-intercourse agreements, would induce the British Administration to yield and restore hafmony again between the Colonies and the mother country. In England, there were many American sympathizers, who urged the Colonists to persist in the honorable course begun to secure the restoration of their rights.

The members of this Congress in the Declaration of Rights, presented to the world as their point of view upon the question of Colonial privileges, admitted the right of Parliament to regulate Commerce by the enactment of bona-fide laws, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members; but they denied the inherent right of Parliament to impose taxes purely for revenue purposes.[1]

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1 Journals of Congress 1774, 28, 29; History of the American Colonies, Marshall, 412,483.
"Resolves, 4. That the foundation of English liberty and of all free government is a right in the people to participate in their legislative council; and as the English Colonists are not represented, and from their local and other circumstances cannot properly be represented in the British Parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign in such manner as has been heretofore used and accustomed. But from the necessity of the case, and a regard to the mutual interests of both countries, we cheerfully consent to the operation of such acts of the British Parliament as are bona fide restrained to the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members; excluding every idea of taxation, internal or external, for raising a revenue on the subjects in America without their consent."

Congress addressed the inhabitants of the Colonies, and exhorted them to be firm, urging that "against the temporary inconveniences you may suffer from a stoppage of trade, you will weigh in the opposite balance, the endless misery you and your descendants must endure, from an established arbitrary power"[1]. Throughout the Colonies, the recommendations of Congress were adhered to as laws of strongest obligation.

Coercive Measures of Parliament

Early in 1775 Lord Chatham took steps calculated to conciliate the Colonies. He presented a bill to Parliament providing for the withdrawal of British troops, which had been quartered in Boston. Not discouraged by the defeat of this measure, he presented a further bill calculated to settle the difficulties of America. But Parliament was strongly inclined to support its policies to the limit and so this conciliatory move was discountenanced. Shortly thereafter, Parliament declared to the King, in a motion sponsored by Lord North, that "a rebellion exists in the province of Massachussetts Bay". Parliament, inflamed against the opponents of its policies, determined to bring the Colonies to submission by means of coercive commercial restraints. As might have been expected, action was taken first against New England. A bill was introduced restricting the trade of Massachusetts, Connecticut, Rhode Island and New Hampshire to Great Britain, Ireland and the British West Indies and prohibiting those Colonies from carrying on fisheries on the Banks of Newfoundland and other places. While this bill was pending, Lord North proposed, as an alternative, that the Colonies should be permitted to tax themselves in such manner as would be satisfactory to them.

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[1] History of the American Colonies (Marshall), 419.

This proposition, designed to divide America and unite Great Britain, was forthwith transmitted to the governors of the respective colonies. As it proved unacceptable the coercive trade bill was passed in February, 1775.[1] Subsequently, upon the receipt in England of information to the effect that certain other Colonies were actively engaged in supporting the opposition of New England, a second bill was enacted, imposing similar restrictions on the remaining Colonies, except New York, Georgia and North Carolina, which were considered less disaffected than the others.[2]

The Beginning of the Revolution

In April, 1775, occurred the first clash between the Colonists and the British at Lexington. Even after Lexington, many Americans fondly hoped that the difficulties with Great Britain might be composed. Congress set to work putting the country in a state of defence, but at the same time passed resolutions expressing the most fervant desires of conciliation with the mother country. It was determined to address a petition to the king and to take steps toward negotiations in order "to accommodate the unhappy disputes subsisting between Great Britain and the Colonies."[3]

Congress Adopts Further Non-intercourse Measures

In May, 1775, Congress having no great confidence in the pacific overtures made to the Crown, adopted resolutions extending the prohibition on importations to Quebec, Nova Scotia, St. John's, Newfoundland, Georgia, except St. John's Parish and East and West Florida.[4]

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1 History of the American Colonies (Marshall) 426-428. Political and Civil History of the United States (Pitkin) 314.
2 Journals of Congress, 1775, 103.
3 History of the American Colonies, (Marshall), 443.
4 Journals of Congress, 1775, 103.

Even, however, after the battle of Bunker Hill in June, 1775, allegiance to the king was still acknowledged, and hope still remained that the difficulties with the mother country might be amicably adjusted. Congress addressed the King in a most humble and dutiful petition, and in a cordial letter directed to the people of England, referred to them as "friends, countrymen and brethren," and urged that the steps thus taken were designed to prevent the dissolution of "that connection which the remembrance of former friendships, pride in the glorious achievements of common ancestors, and affections for the heirs of their virtues, has heretofore maintained"[1]. They professed themselves as opposed to independence, and declared that union with England, based on constitutional principles, was the most to which their hopes aspired.

Prohibition of Trade With the Colonies Declared by Parliament.

In December, 1775, Parliament took more decisive steps and thus forced matters to a speedy climax. All trade and commerce with the colonies was prohibited. The capture and condemnation of all vessels and their cargoes found trading with the colonies, was provided for. The title to property so taken was vested in the captors, and the crews of such captured vessels were to be treated as slaves[2]. In retaliation, the Congress authorized the exportation and importation of goods from all foreign countries, not subject to Great Britain; prohibited the importation of slaves; and provided for the forfeiture of prohibited goods[3].

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[1] History of the American Colonies (Marshall), 457.
[2] Political and Civil History of the United States, (Pitkin), 314.
[3] Journals of Congress, 1776, 122, 123.

The Adoption of the Declaration of Independence.

All of these measures, progressively moved toward separation from the mother country, and marked a rugged determination on the part of the Colonists to maintain their liberties at every hazard. Thereafter events moved decisively. On June 7, 1776, a resolution of Congress recited that a Committee be appointed to prepare a declaration "that these united Colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown; and that all political connection between them and the state of Great Britain is, and ought to be, dissolved."[1] On June 11, a committee was appointed to prepare a form of confederation to be entered into between the Colonies; another committee was deputized to arrange a plan of treaties to be proposed to foreign powers[2]. On June 28 the committee appointed to prepare a declaration of independence submitted the results of its labors. On July 2, the Congress adopted the resolution for independence; on July 4, it adopted the Declaration of Independence.

By the Declaration of Independence the colonies threw off their allegiance to Great Britain and became sovereign and independent states, associated together in a congressional body for mutual protection. As yet, Congress was still a revolutionary body, which had no defined power, and looked to the individual states for such action as appeared necessary. Nevertheless, by common consent, Congress took upon itself those powers of external control, which before had been conceded to the King or Parliament, together with such others, as the emergency called for from day to day.

During the revolution most of the laws of the colonies laying duties on imports and exports expired or were repealed, as trade was virtually suspended[3].

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1 Journals of Congress, 1776, 205, 206.
2 Journals of Congress, 1776, 207.
3 Laws of Maryland (1765-1784) February 1777, Chapter 18; Hening, Statutes, (Virginia) IX, 162, 361.

III

PERIOD OF THE CONFEDERATION

Ratification of the Articles of Confederation.

The union of states grew out of the exigency of the times; the Continental Congress had no definitely established area of jurisdiction; it was a war-time body, born of expediency, and from its nature and purposes might well have been temporary, existing only until the conclusion of war and the restoration of peace; it was, however, realized by discerning minds that the future existence of the states as independent sovereignties was fraught with danger. Separated, the opportunity of future reconquest by Great Britain was enhanced. Moreover, there was a possibility of serious differences, perhaps civil war, between the different Colonies. Accordingly, the same mutual interests which had united the colonies so often against Great Britain, now drew them together as independent States.

On June 11, 1776, the day on which a committee had been appointed to prepare a Declaration of Independence, Congress passed a resolution declaring that "a committee be appointed to prepare and digest the form of a confederation to be entered into between these Colonies"[1]. The following day such a committee was appointed, consisting of one member from each Colony. On July 12 this committee reported a draft of the Articles of Confederation. Debate on this report was had between July 22 and August 20. On the latter date, Congress, in committee of the whole, reported a new draft, which was ordered to be printed for the use of the members[2]. Consideration of this matter was not taken up again until the following year, when it was debated several times. On November 15, 1777, the articles were finally adopted by Congress. A circular letter, drafted by a

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1 Journals of Congress, 1776, 207.
2 Secret Journals, 1776, 304.

Congressional Committee, was transmitted to each of the States, requesting that their delegates in Congress be authorized to subscribe the Articles of Confederation on their behalf.

At this time, New Jersey registered formal objection to the Articles as drafted, because they contained no provision for the regulation of the foreign trade of the country by Congress. On June 25, 1778, the legislature of New Jersey laid before Congress a memorial, in which it was declared that the exclusive power of regulating the trade of the United States with foreign nations ought to be clearly vested in the Congress, and that the revenue arising from the duties and customs ought to be appropriated to the building and support of a navy for the protection of trade and the defence of the coasts, and to other public and general purposes for the common benefit of the States[1]; New Jersey had felt the force of conflicting regulations in the colonial days[2], and was destined to do so again, because of the very weakness which it criticised in the Articles of Confederation. No heed was paid to this most timely warning. At that time, however, the necessity of delegating this power to the Federal government was not understood. The commercial states considered that it would be profitable for them as importers to levy contribution on their less fortunate neighbors. The people generally did not appreciate that, without some central authority to regulate the entire body of trade uniformly, the conflicting regulations of different States inevitably would spell the doom of the Confederation.

On June 26, 1778, a copy of the Articles of Confederation, engrossed for ratification, was prepared. It was ratified by all the states except Delaware and Maryland in 1778; by Delaware in 1779, and by Maryland on March 1, 1780. On that date its ratification was announced by Congress[3].

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1 Journals of Congress IV, 269,270; The United States Constitution, Curtis, Vol.I,130.

2 American Colonies, Osgood, II,187-190; New York Colonial Documents, III, 389,428; New Jersey Archives, first series,I, 524-527,535,537,540;II, 136-138, 178,179,200,218-221,227-228.

3 Secret Journals, 410,418,423, 424, 426.

Power of Congress to Regulate Interstate and Foreign Commerce, under the Articles of Confederation.

The style of the confederacy was declared by the first article to be "The United States of America". The second article declared that each State retained its sovereignty, freedom and independence, and every power, jurisdiction, and right which was not expressly delegated by the confederation to the United States in Congress assembled. By subsequent articles, Congress was given the power of regulating trade with the indians, of sending ambassadors to foreign countries and receiving similar representatives of foreign governments, of entering into treaties and alliances with foreign countries, subject to the limitation that "No treaty of commerce shall be made, whereby the legislative power of the States shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever".[1] This limitation was qualified to the extent that the States were prohibited from laying "imposts or duties, which may interfere with any stipulation in treaties, entered into by the United States in Congress assembled, with any king, prince or state, in pursuance of any treaties already proposed to Congress, to the Courts of France and Spain".[2] The States were restrained from entering into treaties, confederations or alliances without the consent of Congress.

As the power to regulate interstate and foreign commerce was not expressly delegated to Congress, it was reserved to the individual states, under the second article. In the negotiation of commercial treaties Congress could only agree that the imposts and duties as laid by each State should be uniform as be-

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1 Articles of Confederation, Article IX.
2 Articles of Confederation, Article VI.

tween the trade of its inhabitants and those of the nation with which the treaty was made. No uniformity as between the thirteen states could be guaranteed.

The British Orders in Council of 1783.

In most of the States the imposition of duties and imposts was discontinued during the Resolution. In 1780 the States began to restore these measures. With peace came the necessity of providing for the current expenditures of government and the liquidation of war debts.

In March 1783, William Pitt, Chancellor of the Exchequer of the British Government, sponsored a bill in Parliament for the regulation of commerce between Great Britain and the American States, which was based on liberal principles. It proposed to open the ports of England to American ships, provided that American goods should pay duties equivalent to those borne by British goods transported in British ships, and permitted the Americans to engage in trade with the West Indies. If this bill had been passed, peace and harmony between the United States and Great Britain would have resulted. But the members of Parliament doubted that the States would ever be united in harmony, because of the contrary commercial interests among them, and the lack of power in the central government. They feared tp commit themselves to a definite policy in respect of thirteen States, the regulations of which were not uniform, and varied from day to day. Hence the bill was rejected.

The policy of the British Government during the Colonial period had created a demand in America for English goods. Attempts were made to inaugurate trade with France and other countries of continental Europe, which, generally speaking, were unsuccessful. There were some exports of rice, tobacco and fish. But the ports of continental Europe had been closed to American

shipping so long that little demand existed for their goods. The principal trade was with the West Indies.[1] This trade was necessary in order to pay for English manufactures. The whale fisheries and the Newfoundland banks were the nurseries of British seamen. If foreigners were permitted to carry whale oil to England and fish to the west Indies, this would occasion a tremendous reduction in British shipping.[2] Great Britain, apprehensive that, under the new form of government, the maritime power of the American States might increase to an extent which would interfere with its carrying trade, determined to guard against that contingency by means of severe repressive measures.[3] Accordingly, on July 2, 1783, Orders in Council were issued prohibiting trade with the British West Indies in American vessels, and forbidding the carriage of fish, beef, pork and other important American commodities to those colonies, even in British bottoms.[4] This prohibition was continued by temporary acts until 1788, when it was permanently established by act of Parliament.[5] These regulations were issued "in full comfidence that the United States cannot agree to act as one nation".[6]

Measures of Retaliation Adopted by the States.

The states were righteously indignant. The series of restrictive measures enforced by Parliament from 1651 down to the Revolution had succeeded rather well in confining the trade of the Colonies to British possessions. During the Revolution there was little opportunity to develop new markets. France had made

[1] History of the United States McMaster, Vol. L, 206; American Commercial Legislation before 1789, Giesecke, 123.

[2] History of the United States, McMaster, Vol. I, 238.

[3] The Federalist, XI

[4] History of the United States Constitution, Bancroft, Vol. I, 146; The United States Constitution, Curtis, Vol. I, 284; Political and Civil History of the United States, Pitkin, Vol. II, 191.

[5] Political and Civil History of the United States, Pitkin, Vol. II, 191.

[6] John Adams to Congress, Diplomatic Correspondence, VII, 81, 88, 100; History of the United States Constitution, Bancroft, Vol. I 146; The Origin and Growth of the American Constitution, Taylor, 168.

some concessions, but the trade of the Colonies had not learned its way to that country. The avenues of British commerce now being closed to them, trade dropped almost to nothing.[1]

The first thought was reprisal. Higher duties were provided on goods imported in British vessels. The New England Colonies, Connecticut excepted, were most active in discriminating against British shipping. Connecticut adopted a policy of free trade toward Great Britain.[2] In New Hampshire, Massachusetts and Rhode Island, prohibition was laid upon the loading or unloading of commodities produced in the United States by British ships. In Rhode Island this regulation forbade the entry of British ships into ports of that state.[3] New York, Maryland, Virginia and North Carolina joined actively in laying discriminatory duties against the British.[4] In New York higher duties were to be imposed upon goods imported from Rhode Island, Connecticut, New Jersey or Pennsylvania, unless it could be shown to the satisfaction of the Collector that they had not originated in England.[5] Some of these discriminations extended to all foreign shipping. Maryland and Virginia laid export duties on wheat, flour and tobacco.[6] In 1787, upon complaint of Dutch merchants, Virginia placed goods imported in Dutch ships and those of other countries having commercial treaties with the United States upon the same basis as goods imported in vessels of any of the States.[7]

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1 History of the United States, McMaster, Vol.I,206.
2 Collection of Papers on Navigation and Trade (1807) 57,58.
3 New Hampshire State Papers,XX,502;Political and Civil History of the United States,Pitkin,Vol.II,192;Colonial Records of Rhode Island,X,106,121,141.
4 Laws of New York(1785)Chapter 7;Chapter 34;Laws of Maryland, (1765-1784)Chapter 29;Hening,Statutes,(Virginia)XII,290;State Records of North Carolina,XXIV,718.
5 Laws of New York(1785)Chapter 34.
6 Hening,Statutes,(Virginia)IX,162,361,551;XI,95,201;XII,288; Laws of Maryland(1765-1784)Chapter 18,1777;Chapter 50,1782; Chapter 84,1784; Calendar of Virginia State Papers,IV,80.
7 Hening, Statutes, XII,290.

Many things combined to render these reprisals unsuccessful. There was no uniformity in the attitude of the States toward the British. While many of them laid heavy and discriminating burdens on British shipping, Connecticut invited British trade by a free trade policy, and New Jersy, Delaware and South Carolina adopted a passive attitude. Moreover, the expectations as to intercourse with other nations fell absolutely flat. Trade with England was so well established that it could not easily be throttled. The people of the States had believed that their industries would enable them to produce the means of paying for foreign goods as of old. But the trade with the British West Indies was obstructed, and there was no market for rice, tobacco, pitch, turpentine and ships. Moreover, British traders, immediately upon the signing of the Peace treaty with Great Britain, had established themselves in the Colonies, and were able to import English goods at such low prices that native merchants, unable to compete, were crushed.

With hundreds of English ships in the American carrying trade, the British press, backed by the government, succeeded rather well in convincing the other nations of Europe that trade with the United States was not worth while.[1]

In this situation the commercial towns of the northern and central states began to complain bitterly. Congress was urged to change its barren discussions for efficient remedies.

On January 11, 1785, at a meeting of merchants and merchanics of New York, held to welcome the opening session of Congress in that city, it was resolved: "We hope our representatives will coincide with the other States in augmenting your

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[1] History of the United States, McMaster, Vol.I,225. Jefferson to Monroe, August 28, 1785,"The English papers are so incessantly repeating their lies about the tumult, the anarchy, the bankruptcies, and distress of America, that these ideas prevail very generally in Europe."

power to every exigency of the union." The Chamber of Commerce of New York likewise requested Congress to act so as to protect the commerce of the United States from the injurious foreign acts to which it was sujected.[1]

The main source of the prosperity of Massachusetts always had been the fisheries and shipping. The restrictions laid by the British Orders in Council had destroyed both these avenues of trade. Moreover, the swarms of British traders which congregated in Boston, had been able to import English goods so cheaply as to drive native importers from business. The merchants of Boston, roused to action, met on April 15, 1785, and prepared petitions to Congress and the Legislature of Massachusetts. The petition to the legislature urged that the attention of the delegates in Congress be directed to the state of affairs existing in Massachusetts; that to Congress set forth the difficulties with which the tradesmen of Boston were beset. As usual, the men of Massachusetts realized the importance of united action, in dealing with the situation. They established a Committee of Correspondence, to communicate with and induce the merchants of every sea-port in the nation to take similar action. They concluded by pledging themselves not to purchase goodssfrom British merchants trading in the United States. A meeting of citizens, held at Faneuil Hall on April 18 of the same year, bound themselves not to purchase goods of resident British factors, and entreated Congress to take steps necessary

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1 History of the United States Constitution, Bancroft, 186; MS volume of Remonstrances and Addresses, 343,351.

for their relief.[1] On May 3, 1785, the mechanics of Boston met and adopted resolutions coinciding substantially with those drawn up by the merchants on April 15.[2]

Beginning on June 2, 1785, the citizens of Philadelphia assembled in continuous convention for eighteen days, and passed resolutions declaring that relief from the burdens under which American trade lanquished could only be realized by granting Congress full power over the commerce of the country.[3]

While these various resolutions were doomed to immediate failure, eventually, augmented by the unanimous will of all the States, they were destined to achieve complete success. But the States were not yet ready to abandon the sovereignty so lately wrung from the British crown even in the interest of their own welfare. They were apprehensiwe that if the power to regulate commerce, were granted to Congress, it might be exercised to their detriment. They feared that this would render the transition from dependence to sovereignty a matter of mere form, the exactions of Congress being substituted for the tyrannies of Parliament.[4]

The Regulation of Interstate Commerce under the Articles of Confederation.

It has been observed that, during the period of the Confederation, the regulation of foreign commerce was far from uniform. When Massachusetts started the movement for re-

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1 History of the United States Constitution, Bancroft,188.

2 Boston Gazette,May 9, 1785; History of the United States, McMaster, Vol.I, 255.

3 History of the United States Constitution, Bancroft,187.

4 The Federalist, Scott, Essays on the Constitution, Letters of Agrippa, James Winthrop,539: "They (Congress) have indeed very nearly the same powers claimed formerly by the British Parliament. Can we have so soon forgot our glorious struggle with that power, as to think a moment of surrendering it now?"

taliation against the British Orders in Council by closing its ports to British vessels, Connecticut, influenced by motives of self-advancement, declared its ports free. Moreover, immediately thereafter, that state laid duties on goods imported from Massachusetts.[1] The attitude adopted by Delaware, New Jersey and South Carolina was hardly less blameworthy. As a result, the force of the restrictive measures of Massachusetts and the other commercial States upon British shipping was lessened, to the great detriment of their commerce and trade.

The tariff legislation of the States was actuated by motives of revenue, protection and discrimination. In addition to the disabilities imposed upon British trade, duties were laid to encourage manufactures and to discriminate against other States. While the necessity of providing an adequate revenue probably furnished the chief reason for tariff legislation, discrimination constituted an important motive. The policy of protection was in its infancy, and ordinarily, duties imposed for that purpose were merely incidental.

Massachusetts provided more complete protection to indus-

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1 Calendar of Virginia State Papers, IV, 60,61; Madison, Works, I, 216.

tries than any other State.[1] Pennsylvania also passed tariff laws intended, primarily, for the protection of iron, steel, leather, hats, books, and lumber for shipbuilding.[2] The Pennsylvania statute is important, since it constituted the basis for the first Federal tariff legislation. New Hampshire, Rhode Island and New York also imposed duties for incidental protection.[3]

The navigation laws of Maryland, Pennsylvania, New York and New Jersey regarded the citizens of other States as aliens.[4] The power to tax the produce of adjoining States, exported through maritime towns, was often exercised oppressively. Virginia and South Carolina taxed the tobacco of North Carolina, Pennsylvania taxed the products of Maryland, New Jersey and Delaware, New York taxed the products of Connecticut and New Jersey. In this manner, those States which did not possess accessible and convenient seaports were forced to submit to the exactions of the more advantageously situated States, through the ports of which their produce must be exported.[5] New Jersey and North Carolina were particularly unfortunate in this respect.

The regulations of each State were predicated upon its own particular interests, without reference to the manner in which they affected its neighbors. Commerce which was encouraged by Massachusetts was restricted by Virginia. South Carolina sought to promote the exportation of pitch and indigo, but was not interested in furs. New York, on the other hand, was disinclined to protect the trade in pitch and indigo, but was deeply concerned in the fur trade. The bulk of the revenues of New England was derived from lumber, fish and oil, while Pennsylvania's chief interest lay in iron, corn and grain. The prosperity of

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1 Laws of Massachusetts, 1783-1789-149,300,529.
2 Laws of Pennsylvania, 785, 669.
3 Laws of New Hampshire, 1776-1789,152,159; Colonial Records of Rhode Island,X,89,106,115,150; Laws of New York,March 32, 1784, Chapter 10; November 18,1784,Cahpter 7; April 11,1787, Chapter 81; March 12, 1788, Chapter 72.
4 Journal of the Federal Convention,Madison,(Scott) 46-47.
5 Journal of the Federal Convention,Madison,(Scott) 46,47.

their neighbors was not, in any sense, a matter of concern with the individual States.[1]

Some of the States discriminated by laying higher tonnage duties on goods when transported in vessels belonging to citizens of other States than were imposed on similar goods when carried by vessels belonging to citizens of the legislating States.[2]

In 1787, at a meeting of merchants of Portmouth, Va., it was declared that the high tonnage duty in force would effectually stop the carrying trade from Maryland and Carolina, "as the tonnage on small vessels would frequently amount to as much as the freight of their cargoes".[3]

The exactions of one State frequently brought forth onerous retaliatory measures from other States. The State of New York was particularly selfish and blameworthy. The city of New York had long received firewood from Connecticut, and butter, cheese, poultry and vegetables from New Jersey. This trade carried considerable sums out of the city and "into the pockets of detested yankees and despised Jerseymen." As a remedy for this, the New York Legislature in 1787 enacted that every boat, of more than twelve tons burden, engaged in bringing supplies from New Jersey, should be entered and cleared at the custom house in the same manner as vessels from foreign ports; that boats from Connecticut, should pay entrance fees and increased dockage; and that the carting of firewood across the city of New York should be heavily taxed. These taxes made heavy inroads on the profits of the producers in both Connecticut and New Jersey. They complained bitterly to the New Yorkers, but to no effect. The state of New Jer-

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1 History of the United States, McMaster, Vol.1,206.
2 Calendar of Virginia State Papers,IV,169; Colonial Records of Rhode Island,IX,708; Cooper, Statutes of South Carolina,IV, 582,593,621; Hening, Statutes of Virginia, XI,70,121.
3 Calendar of Virginia State Papers, IV,240.

sey found a means of retaliation. A short time before the city of New York had built a lighthouse upon a small piece of land which it had acquired at Sandy Hook, In New Jersey. A tax of $1800 per annum was laid upon this property by the legislature of New Jersey.[1] The Legislature of Connecticut having taken no action, the business men of New London, being highly incensed at the action of New York, formed a league, and agreed, under the penalty of $250, not to send into New York any article whatsoever nor to furnish any craft bound to that state with any kind of lading for the period of one year from July 30, 1787.[2]

The Treaty Power of Congress under the Articles of Confederation.

Shortly after the ratification of the treaty of 1784 with England, Congress turned its attention to the question of commercial intercourse with foreign nations. While the sole power of negotiating treaties rested in Congress, the full provisions of treaties entered into with foreign nations could not be guaranteed as the States might, by legislative action, destroy the effect of treaty provisions. The conduct of several of the States invalidated certain provisions of the treaty of 1784 with

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1 Letter from Brunswick, in American Museum, December, 1787,601; History of the United State, McMaster,405; Critical Period of American History, Fiske, 146; American Commercial Legislation before 1789, Giesecke, 135.

2 Pennsylvania Gazette, June 27, 1787; History of the United States, McMaster, 405; Critical Period of American History; Fiske, 146; American Commercial Legislation before 1789, Giesecke 135.

England.[1]

In 1778 a treaty of amity and Commerce had been concluded with France. Under the Confederation, Congress appointed commercial agents abroad and secured commercial treaties with Holland in 1782, Sweden in 1783, and Prussia in 1785.[2] Congress expected to create new markets in continental Europe by these treaties. Reciprocal freedom of trade was attempted, at a time when commercial restrictions were the rule. The treaties provided substantially that each nation should be permitted to transport its goods in vessels to ports of the other nation, and bring back the goods of the latter in like manner. Tariff duties were to be on basis of the most favored nation.

The difficulties under which American commerce labored as a result of the British restrictions rendered a commercial treaty with Great Britain of paramount importance. On February 24, 1785 John Adams was appointed Minister Plenipotentiary to represent the United States at London. His instructions were to make strong representations to the British Ministry concerning the advisability of removing the restrictions which still throttled American Commerce.[3] The British government was unwilling to relinquish the commanding advantage which it held over American trade, by means of the restrictions imposed by Orders in Council. The inability of Congress to enforce commercial treaties provided an excellent pretext upon which any government, which had other more substantial reasons not proper to be disclosed, might base its refusal to enter into such engagements with the United States. On March 26, 1785, the Duke of Dorset,

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1 The United States Constitution, Curtis Vol.1, 179.

2 Treaties and Conventions of the United States (1889) 296-306, 749,899,1042.

3 Secret Journals, Vol, 3, 535, 536.

writing to Franklin, Adams and Jefferson, the American Peace Commissioners, inquired "what is the real nature of the powers with which you are invested, whether you are merely commissioned by Congress, or whether you have received separate powers from the respective States *** The apparent determination of the respective States to regulate their own separate interests renders it absolutely necessary, toward forming a permanent system of commerce, that my court should be informed how far the Commissioners can be duly authorized to enter into any engagements with Great Britain, which it may not be in the power of any one of the States to render totally useless and inefficient."[1] This polite inquiry was unanswerable. Congress could provide no guaranty that the states would observe treaty provisions. The Commissioners of the United States were not empowered to execute treaties on behalf of the States, as such. Hence, the commercial engagement of greatest importance to the union at that time was deferred, by virtue of one of the fundamental defects in its form of government.

Ineffectual efforts were made to secure a commercial treaty with Spain, chiefly due to the fact that that Nation consistently refused to agree that vessels of the United States might navigate the lower courses of the Mississippi River.[2]

The efforts of Congress to secure Commercial engagements with foreign nations during this period were foredoomed to failure. Nations declined to bind themselves with a party not capable of being held to its obligations. As Washington observed, the attitude of America must have appeared contemptible to those

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[1] Diplomatic Correspondence 1783-1789,II,297. Constitutional History of the United States, Von Holst, 42.

[2] Secret Journals, Vol 3, 517; Political and Civil History of the United States, Pitkin, Vol II, 206.

nations with which treaties were attempted.[1] Generally speaking, the treaties which were negotiated proved of little value. On the other hand, treaties with England and Spain would have opened British ports to American shipping and provided an outlet for the Mississippi Valley.

Attempts of Congress to secure additional powers under the Articles of Confederation, to regulate Commerce.

Hardly was the ink dry on the Articles of Confederation, when discerning minds realized their impotence. The power of Congress was merely recommendatory, even on questions of finance, and an affirmative vote by every State was required to transform the recommendations of Congress into effective measures. In meeting the exigencies of the times Congress resembled a high-class debating society more than the central regulating authority of a nation.

On February 3, 1781 Congress rejected a motion by Mr. Witherspoon, affirming that "it is indispensibly necessary, that the United States, in Congress assembled, should be vested with a right of superintending the commercial regulations of every State, that none may take place that shall be partial or contrary to the common interests."[2] Upon the same day, however, a resolution was adopted by Congress recommending to the States that it be granted authority to lay a duty of five per cent on goods of foreign growth or manufacture, imported into United States, with the exception of articles imported on account of the United States, and wool-cards, cotton cards, wire used in making

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[1] Life of Washington, Marshall, V, 73; North American Review, October 1827, 257, 258; Atchesons Collection of Reports, 55. Story on the Constitution, Vol I, Paragraph 261. "America (said Washington) must appear in a very contemptible point of view to those with whom she was endeavoring to form commercial treaties without possessing the means of carrying them into effect. They must see and feel that the Union, or the States individually, are sovereign, as best suits their purposes. In a word that we are a nation to day, and thirteen to-morrow. Who will treat with us on such terms?"

[2] Gibbons v. Ogden, 9 wheat, 1, 225.

them, and salt.[1] The proceeds from this duty were to be used in payment of the debts contracted during the Revolution on the credit of the United States. While the motion which was lost contemplated the regulation of commerce, the recommendation of Congress was intended merely as a means of raising fevenue. An urgent letter accompanied the resolution to the States, indicating the necessity of providing revenue for purposes of government. Most of the States replied affirmatively within a comparatively short time. By 1782 all had approved the resolution except Georgia and Rhode Island. They were requested to return a definite answer immediately.[2] The response of Georgia assured favorable action by that state. On November 1, 1782, the assembly of Rhode Island refused to give its assent to this augmentation of the power of Congress on the ground that: (1) Such an impost would burden the commercial states most, and would bear particularly hard on Rhode Island; (2) It would involve the creation of officers unknown to the Confederation; (3) Because a revenue for which Congress was not accountable to the States would render that body independent of its constituents, and would be dangerous to the liberties of the United States. On November 30, 1782 this intelligence was communicated to Congress.[3] As the other States had conditioned their assent upon similar action by all the States, the attitude of Rhode Island effectually precluded the exercise of this very necessary power by Congress.

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1 Journals of Congress (1800) VII, 22.
2 Journals of Congress, VII, 370.
3 Records of Rhode Island, IX, 682, 683, 684; The Origin and Growth of the American Constitution, Taylor, 156.

On April 18, 1783, Congress recommended to the States, as "being indispensibly necessary to the restoration of public credit, and to the punctual discharge of the public debt," that it be clothed with authority to impose certain specified duties on spirits, wines, teas, pepper, sugar, molasses, cocoa and coffee, and an ad valorem duty of five per cent on all other goods. The duty was to be applied exclusively to the payment of the principal and interest of the public debt, and was to cease at the expiration of twenty five years, if by that time the public debt had been totally extinguished. The States were to be required, moreover, to establish effective measures of such character as each should deem advisable, for the purpose of providing revenues aggregating $1,500,000 per annum for the use of the United States, exclusive of duties on exports, the proportionate part to be borne by each state being fixed in accordance with the Articles of Confederation. This proposition was to take effect when assented to by all the states.[1] A letter prepared by Madison, Hamilton and Ellsworth, answering the objections to the recommendation previously made for an impost and urging the imperative necessity of adopting the present measure, accompanied the resolution to the States.[2] The States never accepted this plan in such manner as to render it operative. A jealousy had grown up between the state and general governments. The States considered their individual interests paramount to the welfare of the United States as a whole. Some of the States laid heavy contribution on the trade of neighbors forced, by disadvantages of geographical location, to use their ports. These advantages they were reluctant to relinquish. By 1786 all of the States but New York had assented to the measure. The legislature of that State, in regular session, had reserved

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1 Journals of Congress, VIII,139.
2 Journals of Congress, VIII,145-150.

to itself the right of levying duties in accordance with a law passed in 1784. As the consent of New York alone was lacking to render the measure effective, Congress requested Governor Clinton to convene the legislature in special session, for the purpose of considering it. This he declined to do, upon the ground that his authority to convene the legislature was confined to extraordinary occasions, and as the resolution had but recently been considered by the legislature, no such occasion existed. To a second urgent request, he returned the same rejoinder.[1] In this manner, the selfish action of a single State again proved sufficient to prevent the exercise by Congress of a legitimate power of government.

In 1783 Maryland had instructed its delegates in Congress to "agree and ratify" measures empowering that body to prohibit the importation of foreign goods in vessels other than those owned and navigated by citizens of the United States.[2] In December 1783, Virginia had authorized Congress to prohibit importations of goods of the growth or produce of the British West Indies into the United States in British vessels, "or to adopt any other mode which may effectually tend to counteract the designs of Great Britain, with respect to the American commerce, so long as the said restrictions shall be continued on the part of Great Britain."[3] In 1784, South Carolina enacted similar legislation, but conditioned it upon like action by all the states.[4]

On April 20, 1784, Congress took action toward securing power to protect American commerce from further British aggression. A recommendation was submitted to the States, that Congress be granted power to prohibit, for a period of fifteen years, the im-

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1 Journals of Congress, XI, 133, 145.
2 Laws of Maryland, 1765-1784, Chapter 29 (December Session)
3 Hening, Statutes, XI, 313.
4 Cooper, Statutes, IV, 596.

portation to or exportation from the United State, of goods in vessels belonging to or navigated by subjects of any power which had not entered into commercial treaties with the United States; and to forbid, the importation into the United States by subject of any foreign nation, of goods or merchandise, not the produce or manufacture of the dominions of their own sovereign, unless authorized by treaty. The approval of nine States was required to give effect to this proposition.[1] While the preceding resolutions of Congress, relative to the imposition of duties, were intended primarily as instruments of the taxing power, this last recommendation contemplated an exercise of the power to regulate trade. During the consideration of this resolution, many expressions favorable to it were transmitted to Congress. Town meetings at Philadelphia and Boston championed the grant to Congress of full power to regulate commerce.[2] Governor Bowdoin in his message of May 31, 1785 to the Legislature of Massachusetts suggested that the States appoint delegates to determine the precise power which should be granted to Congress over commerce. Thereupon, the Legislature resolved that the States should appoint delegates to convene for the purpose of revising the Articles of Confederation. The Navigation Act of Massachusetts, passed in 1785, and designed to countervail the British restrictions on American Shipping, was described as "a temporary expedient; until a well guarded power to regulate trade shall be entrusted to Congress".[3] This time the States carefully guarded their assent with conditions which rendered unanimous action unlikely. Massachusetts, New York, New Jersey

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1 Journals of Congress, IX, 133, 134.

2 History of the United States Constitution, Bancroft, 187, 188; Journals of Congress, 1 May 1785 M. S.

3 Governor Bowdoin's Circular of July 28, 1785, enclosing Massachusetts Act; Annual Register, XXVII; Pennsylvania Packet, July 18, 1785; History of the United States Constitution, Bancroft, 191.

and Virginia passed acts granting the power, but suspended them until the other States had assented; New Hampshire limited its approval to fifteen years; Rhode Island and North Carolina gave Congress power over imports only; Delaware, South Carolina and Georgia fixed other dates for the commencement of the new system; Connecticut, Pennsylvania and Maryland took no action. Thereupon, Congress again presented the resolution to Connecticut, Pennsylvania and Maryland, with a request that definite action be taken, and urged New Hampshire, North Carolina and Rhode Island to reconsider their former acts.[1] By October 1786, all of the States except New Hampshire and North Carolina had granted the power to Congress, in the manner in which it had been requested. Again Congress urged the delinquents to grant their approval.[2] Again, Congress was denied the power which it needed to regulate the affairs of government.

At various times other measures calculated to secure revenue and promote uniformity in the regulations of the different States, were discussed by Congress. James Monroe proposed to limit the right of a State to lay import duties on goods from other States, and to grant Congress power to regulate foreign commerce by laying import and export duties. These propositions were debated in Congress on July 14, 1785. They were supported chiefly by the Northern States. Eventually, however, nothing came of them.[3]

The attempts of Congress to secure the power of taxation followed unsuccessful attempts to collect the quotas apportioned to the States to cover the necessary expenditures of government. Compliance with Congressional requisitions grew more lax, until in 1786, a committee of Congress reported that any further reliance on requisitions would be "dishonorable to the understand-

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1 Journals of Congress, XI, 31,32.
2 Journals of Congress, XI, 189, 190.
3 Hamilton, Writings of Monroe, I, 68, 80-83, 101.

ing of those who entertain such confidence."[1] In February 1787, Hamilton, addressing the Legislature of New York, said in part:

"The pecuniary support of the Federal government has of late devolved almost entirely upon Pennsylvania and New York. If Pennsylvania refuses to continue her aid, what will be the situation of New York? Are we willing to be the Atlas of the Union? Or are we willing to see it perish."

Events were marching swiftly toward the Constitution.

Defects of the Articles of Confederation.

The Confederation was formed under the most unfavorable circumstances. The Colonies had been engaged in a long and bitter struggle against the authority of the British Crown, during which they had experienced in the most practical way, the force of the restrictions imposed by the mother country. These continual struggles had created in them a strong feeling of resistance to all external or centralized authority, and an equally ardent desire to rule themselves through their colonial assemblies. Having but recently thrown off the shackles of a corrupted monarchy, in the eyes of which they lived but to serve, they could not brin themselves to surrender so readily, even to a congress of themselves and their neighbors, that which they had won with so much sacrifice and effort. Their union, far from being the conception of deliberate choice, was formed in haste to oppose with united strength, the measures undertaken by Great Britain. Thrown together thus, for mutual protection and support, they found themselves compelled to delegate some of their sovereign powers to the central regulating body which they had established in such a summary manner. With the army of the enemy spreading desolation everywhere, they had little time to deliberate as to the ultimate effect of their union upon domestic peace or political security.

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[1] Journals of Congress, IV, 619.

With their shipping swept from the seas and trade demoralized, they could scarcely foresee the result of existing regulations upon commerce of the future, which had no counterpart in the past.

When peace was at hand, they yearned for the full measure of the freedom they had won. They knew the intrinsic worth of liberty much better than they understood the blessings of representative government. They opposed augmenting the powers of Congress for reasons very similar to those they had advanced in resistance to the encroachments of Parliament. Jealous of the Congress, they chose to retain the material benefits incident to undivided state sovereignty. It required time and bitter experience to demonstrate that in return for the powers delegated to Congress, material results in increased proportion would redound to them individually. When this lesson was learned, they were prepared for the transition from the Confederation to Constitutional Union.

In 1785, Washington expressed his opinion of the Articles of Confederation in the extremely significant statement which follows:

"In a word, the confederation appears to me to be little more than a shadow without the substance; and Congress a nugatory body, their ordinances being little attended to."[1]

The fundamental defect in the Articles of Confederation was the inability of Congress to execute any of the powers declared by that document to be vested exclusively in it.[2] There was an entire absence of coercive authority to effectuate its own constitutional measures.[3] Congress possessed no power to enforce obedience, or punish disobedience to its laws.[4] No express authori-

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[1] Life of Washington, Marshall, 64; North American Review, October 1827, 249,254, 256; 259; Political and Civil History of the United States, Pitkin, Vol.II, 217..

[2] 1 American Museum, 1786, 270; 3 American Museum 554, 556.

[3] 1 Jefferson's Correspondence, 63.

[4] 1 Kent's Commentaries, 200.

ty to exercise force was delegated to Congress, and such authority as might ordinarily have been implied was expressly prohibited, for each State was to "retain every power, right and jurisdiction not expressly delegated to Congress"[1].

One of the most important general powers not expressly delegated to Congress, and the absence of which placed that body at the mercy of the States, was the power to lay and collect taxes. Another evil resulted from the fact that while the treaty-making power rested exclusively with Congress, that body could not compel the observance of treaty provisions by the States. The chief defect was, however, the lack of power in Congress to regulate interstate and foreign commerce. During the Revolution, this deficiency was not felt to any considerable extent, because trade, except in munitions of war, had practically disappeared from American ports. But the advent of peace, bringing in its train the resumption of commerce and trade, early foredoomed regulation by thirteen independent sovereignties. It would be idle to suppose that thirteen independent communities differing in climate, location and produce would concur in unfform regulations designed primarily to benefit the whole and not certain of its parts. Moreover, this matter had not been worked out to its logical conclusion when the Colonies, in order more effectively to bear the brunt of the war, formulated the Articles of Confederation. It was a situation which could not be appreciated until its practical results were realized. If Congress had been given authority to regulate commerce, the power of levying taxes would not have been so vital, for the regulatory power might well have embraced the incidental right to lay duties.[2]

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[1] The Federalist. XXI.

[2] Constitution of the United States, Tucker, Vol.II, Para. 252.

While Congress might devise budgets and make requisitions upon the States, it had no power to compel their payment. Independence once established, the States evaded the obligations imposed by Congress, until by 1787, their conduct in this respect had become notorious.[1] This fact, coupled with the inability of Congress to guaranty the observance of treaty obligations by the states brought the representatives of the Federal government into disrepute abroad. Foreign nations were unwilling to enter engagements with a government which had such slight assurance of permanency.[2] Moreover the impotence of Congress created unrest and dissention at home. The collapse of the Union was freely predicted.[3]

Each of the thirteen States regulated commerce to suit its best interests, irrespective of the injurious consequences to which neighboring states might thereby be subjected. This selfish policy occasioned continual petty vexations and jealousies, which embittered the States one toward the other. If the legislation of the states had been confined to domestic regulations, the harm to American commerce as a whole would not have been substantial. But their restrictions applied equally to commerce with foreign nations. If the American flag was to remain on the high seas, it was absolutely essential that some uniform policy should be adopted toward the Navigation Acts of Great Britain. As subsequent events proved, the remedy lay in the abrogation in toto of the Articles of Confederation, as they contained so little good and so much bad that they did not constitute a safe basis upon which to establish a firm government.

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1 The Federalist, XXI,XXII,XXXII; Hamilton to Legislature of New York, 1787; Origin and Growth, of the American Constitutio Taylor, 157.

2 Diplomatic Correspondence, 1783-1789,II, 297; Secret Journals, Vol. 3, 517; Political and Civil History of the United States, Pitkin, Vol. II, 206.

3 Report of American Historical Commission, 1896,I,717,719,724, 725,728; Jefferson, writings (Ford edition)III,347,351,398; Johnston, Correspondence and Public Papers of Jay,III,178,179; Hamilton, writings of Monroe, I, 53-55, 59-,80-86, 97-99.

IV.

EVENTS LEADING TO THE CONSTITUTION

Early Complaints of Virginia, under the Confederation.

The degraded state of American Commerce, the financial embarrassment of the Federal government, the animosities created by the commercial wars waged by the States, and over and above all, the inability of Congress to act effectively, eventually, drew the States together in firmer Union in the Constitutional Convention. The trend of events which led to the convention was initiated by Virginia, in connection with certain local affairs of that State. Gradually, it gained impetus, until in the Annapolis Convention five States pledged themselves to a system of centralized constitutional government, with distinctly enumerated powers and the authority to execute and enforce them.

In December 1783, Virginia, complaining of "a disposition on the part of Great Britain to gain partial advantages injurious to the rights of free commerce, and repugnant to the principles of reciprocal interest and convenience, which form the only foundation of friendly intercourse, "[1] had, by unanimous vote of the Assembly, empowered Congress to adopt the most effectual mode of counteracting the restrictions laid by the British on American Commerce.[2] By direction of the Assembly, the Governor of Virginia communicated this act to the executive authority of the other States, with the recommendation that they enact similar measures.[3] He also transmitted a report of what had been done to the Virginia delegates in Congress. This proved to be the first of a series of measures by means of which

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1 Joseph Jones to Jefferson, December 21 and 29, 1783, MSS; History of the United States Constitution, Bancroft, 148.

2 Hening, Statutes, XI, 313.

3 Governor Harrison to the Governor of Massachusetts, December 25, 1783, MS; History of the United States Constitution, Bancroft, 148.

IV.

[illegible]

[illegible]

[illegible] Congress [illegible] Convention [illegible]

[illegible] Virginia, [illegible] with [illegible] States. Gradually, it [illegible] Convention [illegible] powers [illegible] the authority [illegible]

In December 1783, Virginia [illegible] first British [illegible] of the Assembly, [illegible] made [illegible] countervailing [illegible] by the [illegible] an [illegible] by direction of the Assembly, the Governor of Virginia communicated this [illegible] of the other States, with the recommendation [illegible] similar measures. He also [illegible] been sent to the Virginia delegates in Congress. [illegible] to the [illegible] of a [illegible]

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1 [illegible] Jones to Jefferson, [illegible] 1783, [illegible] History of the United States Constitution, [illegible]

2 Hening, Statutes, XI, 313.

3 Governor Harrison to the Governor of [illegible], 1783, [illegible] History of the United States [illegible], 148.

Virginia marshalled the American states on their way to a better, firmer union.[1]

The Mount Vernon Commission.

The Charter of Lord Baltimore had fixed the Potomac River as the boundary line between Maryland and Virginia, but had extended the jurisdiction of Maryland to its southern bank. In 1776 Virginia recognized the validity of this charter, and released to Maryland all the rights and territory claimed by that state, except the free use of the Potomac and Pohomoke Rivers from their sources to their mouths. The language of the grant being in broad, general terms, was susceptible of a construction implying the relinquishment by Virginia of all jurisdiction over the rivers. Early in 1784, Madison, traveling along the Potomac had been informed of many flagrant evasions successfully practised by foreign vessels loading at Alexandria.[2] He communicated this intelligence to the Virginia Legislature, and writing to Jefferson, then a delegate in Congress from Virginia, "of the anomalous condition of things on the Potomac," suggested the propriety of having the rights of the two States on that river determined by a joint commission.[3] Jefferson found the Maryland delegates favorably inclined toward the suggestion of Madison.[4] In June 1784, the Virginia legislature appointed Commissioners to meet the Commissioners selected by Maryland, for the purpose of agreeing upon a common system of regulations for the navigation of the Potomac. In the fall of the same year, Maryland appointed its Commissioners[5]

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1 History of the United States Constitution, Bancroft, 148.

2 History of the United States, McMaster, Vol. I, 277.

3 Madison to Jefferson, March 16, 1784, I, 74; History of the United States Constitution, Bancroft, 151; History of the United States, McMaster, Vol. I, 277.

4 The Biographical Story of the Constitution, Elliott, 107.

5 History of the United States Constitution, Bancroft, 173; Journals of House of Delegates, June 28, 1784.

On March 28, 1785, the joint Commission met at Mount Vernon, and after a full discussion of all matters relating to navigation on Chesapeake Bay and the rivers which were common to both States, amicably adjusted all conflicting claims and agreed upon certain regulations.[1] Among the matters included in the compact were provisions for the establishment of lighthouses and buoys and stipulations made by each of the parties respecting the "commercial regulations of the other, and for the navigation of their several waters by the vessels of the other".[2] As the discussion proceeded, the Commissioners felt the need of enlarged powers to deal with many important commercial matters of interest to the two States. The object of their meeting being fulfilled, they took up matters of general policy and recommended to the two states uniformity in commercial regulations, duties on imports and currency.[3]

The Annapolis Convention.

When the results of the Commission's deliberations were laid before the Virginia Assembly, Washington was consulted. He urged that unless the States were willing to delegate power to Congress for the regulation of commerce, the dissolution of the Union was imminent.[4] In November 1786, the Maryland Legislature extended

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1 History of the United States Constitution, Bancroft, 249; Constitution of the United States, Tucker, Vol. II, Paragraph 251; Story on the Constitution, Vol. I, Paragraph 272.

2 Constitution of the United States, Tucker, Vol II, Paragraph 251.

3 Life of Madison, Rives, I., 548, II, 57; 58. Story on the Constitution, Vol. 1, Paragraph 272. Journal of the Federal Convention, Madison, Edited by Scott, 36.

4 Washington to Stuart, November 30, 1785;
"If the states individually attempt to regulate commerce, an abortion or a many-headed monster would be the issue. If we consider ourselves or wish to be considered by others as a united people, why not adopt the measures which are characteristic of it, and support the honor and dignity of one? If we are afraid to trust one another under qualified powers, there is an end of the Union." History of the United States Constitution, Bancroft, 251.

the recommendations of the Mount Vernon Commission by proposing that Delaware and Pennsylvania be invited to join Maryland and Virginia in formulating a common system of commercial policy.[1]

Madison was the leading figure in the movement which led to the Constitutional Convention. His suggestion had brought the Mount Vernon Convention into being. With keen appreciation of the necessity of investing the Federal government with adequate powers, he saw in the action of the Maryland legislature an opportunity of transforming a meeting of local significance into a convention of national scope. Accordingly, he prepared a resolution to be laid before the Virginia Legislature calling upon all the States to send Commissioners to the proposed trade convention.[2]

Madison was at once an able statesman and a clever politician. Realizing that if he presented the resolution to the Virginia Legislature, his activity in advocating the extension of Federal power would align the opponents of that doctrine solidly against it, he secured the services of Mr. Tyler, an ardent advocate of States' rights for that purpose. On January 21, 1786, resolutions were passed by the Virginia Legislature, calling for a convention of delegates from all the States, "to take into consideration the trade of the United States, to examine the relative situation and trade of the said States, to consider how far a uniform system in their commercial regulations may be necessary to their interest and permanent harmony, and to report to the several States such an act relative to this great object as, when unanimously ratified by them, will enable the United States in Congress effectually to provide for the same."[3] Commissioners to the proposed convention

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[1]Journal of the Federal Convention, Madison, Edited by Scott, 36.

[2]Gibbons v. Ogden 9 wheat, 1, 225.

[3]Elliott, Debates on the Federal Constitution, I, 115-119; Gibbons v. Ogden, 9 wheat 1, 225 Journal of the Federal Convention, Madison, Edited by Scott, 38.

were appointed by Virginia, and the Governor of that State forwarded the resolutions to each State, together with an invitation to them to appoint Commissioners.

Following the leadership of Virginia, Commissioners were authorized by Delaware, Pennsylvania, New Jersey, New York, New Hampshire, Massachusetts, North Carolina and Rhode Island.[1] Annapolis was selected as the meeting place, owing to its remoteness from the influences of Congress and the centers of trade.[2] The day selected for the meeting was the second Monday of September, 1786.[3]

Upon three occasions, Charles Pinckney of South Carolina urged upon the Congress of 1786 the necessity for a constitutional convention. On May 3 of that year he outlined the defects of the Articles of Confederation as being, (1) Lack of power to regulate commerce, (2) Lack of power for raising troops, (3) Lack of authority for the execution of powers granted. Failing in his efforts to secure an affirmative vote for such a convention, he obtained the appointment of a committee which suggested amendments to the Articles of Confederation.[4]

At the time of the Annapolis Convention the union was in an extremely precarious condition. The issuance of paper money by the States had practically destroyed credit. Shay's rebellion was in progress and Congress appeared unable to quell it. The question of the navigation of the Mississippi River had created bitter dissension among the States. Spain had declined to enter into a commercial treaty, because the United States insisted that the right of its vessels to navigate the lower Mississippi should be recognized. While the northern commercial States were not con-

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[1]Journal of the Federal Convention, Madison, Edited by Scott. 37.
[2]History of the United States Constitution, Bancroft, 253.
[3]Journal of the Federal Convention, Madison, Edited by Scott, 37.
[4]History of the United States Constitution, Bancroft, 251, 260.

cerned with the navigation of the Mississippi, they were deeply interested in securing treaty relations with European Nations. They urged in no uncertain terms that the stumbling block to the negotiations with Spain be eliminated. The Southern States, on the other hand, while not so deeply impressed with the necessity of the Spanish treaty as their northern neighbors, were strongly insistent upon the opening of the lower courses of the Mississippi to navigation by vessels of the United States, for the purpose of providing an outlet for their back country in the Mississippi Valley.[1]

On September 11, 1786, the Commissioners of Virginia, Delaware, Pennsylvania, New Jersey, and New York assembled at Annapolis. Commissioners were not appointed by Maryland, Connecticut, South Carolina and Georgia, and those authorized by Massachusetts, New Hampshire, Rhode Island and North Carolina did not attend.[2]

Eight of the States which appointed Commissioners to the convention, had, in conformity with the resolution of Virginia, confined their authority to the consideration of matters relating to trade and commerce. New Jersey had, however, enlarged the powers of its commissioners, to include, in addition to commercial regulations, the consideration of how far other important matters might be necessary to the common interest and perfect harmony of the several States; and had empowered them to report such an act on the subject, as when ratified by the States, "would enable the United States in Congress assembled effectually to provide for the exigencies of the Union."[3] These instructions authorized the Commissioners of New Jersey to discuss all of the defects of the existing form of the Federal government, under the Articles

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1 The Biographical Story of the Constitution, Elliott, 8.
2 Journal of the Federal Convention, Madison, Edited by Scott, 39. Political and Civil History of the United States, Pitkin, Vol. II, 218.
3 Journal of the Federal Convention, Madison, Edited by Scott, 38.

of Confederation, and to propose legislation intended to remedy them.

Hamilton, always an earnest and able advocate of strong central government conceived the time to be propitious for an appeal to revise the defunct Articles of Confederation, so as to render them equal to the exigencies of the Union. He provided a draft of a report to be laid before Congress and the States. The convention, after spending two days in debating and amending the proposed report, adopted it and adjourned.

The report stated, at the outset, that in view of the small number of states represented, the members of the convention deemed it inadvisable to proceed to a full determination of the matters concerning which they had been authorized to act. In this report, they set out certain convictions of the members present concerning the objects for which they had met. They approved the New Jersey idea of extending the powers of Commissioners to objects other than commerce, and suggested that it deserved incorporation into the plan of a future convention. They intimated that the comprehensive character of the power of regulating commerce, and its attendant affect upon the general system of the Federal government, might require an adjustment of other parts of the Federal system. Finally, they recommended a convention of deputies from all the States "to meet at Philadelphia on the second Monday of the next May to take into consideration the situation of the United States; to devise such further provisions as shall appear to them necessary to render the constitution of the Federal government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in Congress assembled, as, when agreed to by them, and afterwards confirmed by the legislature of every State, will effectually provide for the same".[1]

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[1] Story on the Constitution, Vol. I, Paragraph 273; History of the United States Constitution, Bancroft, 280; Elliott, Debates, I, 117-120; The Biographical Story of the Constitution, Elliott, 9.

Upon the receipt of this report, the Virginia legislature took prompt action. On November 3, 1786, a committee was appointed to prepare a suitable bill.[1] In four days the committee reported.[2] Two days later, the bill was passed, concurring with the recommendations of the Annapolis Convention, with one variation, that the new Federal constitution, after being agreed to by Congress, was to be ratified, not by the legislatures of the states, but by the States themselves, thus paving the way for special conventions of the several States. A copy of the bill was transmitted to Congress and to each executive of the States, requesting their acquiescence.[3] On December 4, 1786 the Commissioners of Virginia, seven in number, were chosen, with Washington at their head. New Jersey took similar action on November 23, 1786. Before Congress had acted, six States, Virginia, New

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1 Journals, Virginia House of Delegates, November 3, 1786.

2 Journals, Virginia House of Delegates, November 7, 1786.

3 History of the United States Constitution, Bancroft, 260; Madison I, 259; Story on the Constitution, Vol. I, Paragraph 273, Preamble to act of the Virginia Legislature:
"Whereas the General Assembly of this Commonwealth, taking into view the actual situation of the Confederacy, as well as reflecting on the alarming representations made, from time to time, by the United States in Congress, particularly in their act of the 15th day of February last, can no longer doubt that the crisis is arrived at which the good people of America are to decide the solemn question whether they will, by wise and magnanimous efforts, reap the just fruits of that independence which they have so gloriously acquired, and of that Union which they have cemented with so much of their common blood; or whether, by giving way to mutual jealousies and prejudices, or to partial and transitory interests, they will renounce the auspicious blessings prepared for them by the Revolution, and furnish to its enemies an eventual triumph over those by whose virtue and valor it has been accomplished: and whereas the same noble and extended policy, and the same fraternal and affectionate sentiments which originally determined the citizens of this Commonwealth to unite with their brethren of the other States in establishing a federal government, cannot but be felt with equal force now, as motives to lay aside every inferior consideration and to concur in such further concessions and provisions as may be necessary to secure the great object for which that government was established, and to render the United States as happy in peace as they have been glorious in war."

Jersey, Pennsylvania, North Carolina, Delaware and Georgia had enacted suitable legislation and appointed delegates.[1]

The Calling of the Constitutional Convention.

In February, 1787, a committee of Congress reported, by a bare majority of one that, entirely coinciding with the proceedings of the Annapolis Convention, they strongly recommended to the different legislatures the appointment of delegates to meet in the proposed convention at Philadelphia. No action was taken on this report. On February 21, 1787, King of Massachusetts, moved and Congress adopted a resolution, that a convention be held at Philadelphia on the second Monday in May ensuing, "for the purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein, as shall, when agreed to in Congress and confirmed by the States, render the Federal constitution adequate to the exigencies of government and the preservation of the Union."[2] While this measure purposely omitted any reference to the Annapolis Convention it was identical in point of time, place and substance with the recommendations of that body.

In this manner the States proceeded, step by step, to the threshold of the Constitutional Convention. While the battle for Constitutional government in fact as well as theory was not yet won, the most important movement since the Revolution had been initiated. The Congress without apparent opposition, had gone on record as favoring the extension of Federal powers. More than half of the States were unalterably committed to this view. Public opinion had crystallized in the thought that the

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1 History of the United States, McMaster, Vol. I, 391.
2 12 Journals of Congress, 12, 13, 14; Story on the Constitution, Vol. I, Paragraph 274; History of the United States, McMaster 391, 392; Constitutional History of the United States, Thorpe, Vol. I, 285.

contemplated changes in government were timely and desirable. There remained merely the marshalling of the details.

V.

THE CONSTITUTION.

Meeting of The Constitutional Convention.

Monday May 14, 1787 was the day set for the Constitutional Convention. The delegates of Virginia and Pennsylvania were the first to arrive at Philadelphia. A quorum of seven States was not convened until May 25. On May 28, with representatives present from nine States, a pledge of secrecy was imposed on each member. Eventually, delegates from twelve States were instrumental in the adoption of the Constitution, Rhode Island alone declining to appoint delegates.[1]

The idea of a constitutional convention was not new. It had been speculated upon many times by discerning persons who realized the inadequacy of the powers of Congress. In May 1781 this solution of the problem of Union had been advocated in a Pamphlet by Pelatiah Webster. In 1782, the New York legislature had passed a resolution suggesting that, in order to rectify the defects in the Articles of Confederation, it would be proper for Congress to recommend a general convention to the States. On April 1, 1783, Hamilton had given notice to Congress that he intended submitting a plan for a general convention of the States, to strengthen the form of the Federal government. In the following year, Noah Webster suggested "a new system of government, which should act, not on the States, but directly on individuals, and vest in Congress

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1 History of the United States, McMaster, Vol. I,; Journal of the Federal Convention, Madison, Edited by Scott, 45: "Well known to have been swayed by an obdurate adherence to an advantage which her position gave her, of taxing her neighbors through their consumption of imported supplies, an advantage it was foreseen would be taken from her by a revision of the Articles of Confederation."

full power to carry its laws into effect." In 1786, Pinckney of South Carolina had urged Congress in vain to recommend a constitutional convention to the States.[1]

Many of the proposed plans for correcting the defects of the Federal government contemplated that this should be done by amending the Articles of Confederation. But the convention which assembled at Philadelphia had authority to revise the entire government of the Union.

On May 29, 1787, the convention was opened for the consideration of the matters which had brought it into existence. Edmund Randolph of Virginia, in delivering the opening address enumerated the defects of the Articles of Confederation, and urged that the Union should be made paramount to the States.

Plans of Government Proposed.

Three DISTINCT [redacted] plans were proposed in the convention, to serve as a basis for the new form of Federal government. The Virginia plan, which, eventually, was adopted by the convention, was introduced by Edmund Randolph, on behalf of the Virginia delegation. It provided for a national government, with strongly centralized powers, comprising three branches, the Legislative Executive and Judicial.[2]

The sixth resolution of Randolph, provided "that the National legislature ought to be empowered to enjoy the legislative right vested in Congress by the Confederation; and moreover, to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."[3]

The New Jersey plan, which represented the ideas of the

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[1] Journal of the Federal Convention, Madison, Edited by Scott, 43, 44, 45.
[2] Constitutional History of the United States Constitution, Thorpe, Vol. I, 314, 315.
[3] Elliott's Debates, Vol. I, 144; Journal of the Federal Convention, Madison, Edited by Scott, 62.

delegates from New Jersey, New York, Delaware and Connecticut, was introduced by Mr. Patterson of New Jersey. These delegates opposed a departure from the principles of the Articles of Confederation, which their plan sought to remedy by amendment. This was because the advocates of the new Federal government proposed that representation in Congress should be established on a proportional basis. One of the amendments proposed that "The United States in Congress, * * be authorized to pass acts for raising a revenue, by levying a duty or duties on all goods or merchandises of foreign growth or manufacture, imported into any part of the United States; * * * to pass acts for the regulation of trade and commerce, as well with foreign nations as with each other."[1] The South Carolina plan, by Charles Pinckney of that state, was referred to the Committee of the whole, but thereafter no entry concerning it was made in the minutes of the convention.[2] In Article VI, this plan provided that "The legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises, to regulate commerce with all nations and among the several States; all laws regulating commerce shall require the assent of two-thirds of the members present in each house."[3]

All three plans provided for the regulation of commerce by Congress. In the Virginia and New Jersey Plans the taxing power and the commerce clause were kept distinct. In the South Carolina plan, Congress was given the power to regulate commerce with all nations and among the several States, but a vote of two-thirds of the members present in each house was necessary in order to pass

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1 The Debates in the Federal Convention of 1787, Madison, Edited by Hunt and Scott, 102.
2 History of the United States, McMaster, Vol. I, 439.
3 Madison Papers, 747; Constitution of the United States, Tucker, Vol. II, Paragraph 252; The Origin and Growth of the American Constitution, Taylor, 415; Elliott's Debates, Vol. I, 148.

laws in pursuance thereof. On the other hand, Laws imposing duties required only a majority vote.

Deliberations of the Convention Concerning the Regulation of Commerce.

In the draft provided for the use of the Committee on Detail, Madison included among the legislative powers, "To regulate commerce." Rutledge added "both foreign and domestic", and later inserted in the margin "Indian Affairs."[1] On August 6, 1787 the Committee on detail reported a draft of the Constitution. Two of the clauses reported read as follows:

> "The legislature of the United States shall have power to lay and collect taxes, duties, imposts and excises;"
> "To regulate commerce with foreign nations and among the several states.".[2]

The first clause relating to the taxing power was continued in the final draft of the Constitution, "The Congress" being substituted for "The legislature of the United States". It was not, however, retained with the Commerce Clause, the power to borrow money on the credit of the United States being interposed between them.[3] On August 31, the convention agreed to insert in another part of the constitution "and all duties, imposts and excises laid by the Legislature, shall be uniform throughout the United States".[4] On September 11, the Committee of eleven reported the full wording of the clause delegating the taxing power, as follows:

"The Legislature shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the

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1 Origin and Growth of the American Constitution, Taylor, 415.
2 Journal of the Federal Convention, Madison, Edited by Scott, 453.
3 Constitution of the United States, Articles I, Section 8.
4 Journal of the Federal Convention, Madison, Edited by Scott, 647.

common defence and general welfare of the United States".[1] On September 12, the Committee on Style reported this clause as above, except that "The Congress" supplanted "The Legislature".[2] On September 14, the words "but all duties, imposts and excises shall be uniform throughout the United States," were annexed to it by unaminous vote.[3]

On August 16, the clause "to regulate commerce with foreign nations and among the several States"was agreed to, without discussion.[4] On August 18, Madison submitted certain additional powers to the Committee on Detail, for incorporation in the draft of the Constitution, including the power of the general legislature "To regulate affairs with the Indians, as well within as without the limits of the United States".[5] On August 22, the Committee reported, proposing to add to the Commerce Clause, as previously approved, "and with the Indians, within the limits of any State, not subject to the laws thereof."[6] On September 4, the Committee of Eleven reported and proposed to insert instead "and with the Indian tribes", after the Commerce Clause, as previously adopted. This was agreed to without discussion.[7] On September 12, 1787 ,the Committee on Style reported the Commerce Clause in the form in which it now exists in the Constitution.[8]

As Congress was invested with the exclusive power of regulating interstate and foreign commerce a difference arose between the Northern Navigating States and the Southern Non-navigating States, respecting the exercise of this power. The Southern States

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1 Journal of the Federal Convention, Madison, Edited by Scott, 654
2 Journal of the Federal Convention, Madison, Edited by Scott, 699
3 Journal of the Federal Convention, Madison, Edited by Scott, 724
4 Journal of the Federal Convention, Madison, Edited by Scott, 541
5 Journal of the Federal Convention, Madison, Edited by Scott, 549
6 Journal of the Federal Convention, Madison, Edited by Scott, 585
7 Journal of the Federal Convention, Madison, Edited by Scott, 654
8 Journal of the Federal Convention, Madison, Edited by Scott, 704

feared that the Northern Commercial States, with a majority in the national legislature, would regulate commerce to protect their own interests, without reference to the effect of such regulations on their southern neighbors. The Southern States owned few ships, but were interested in having their products transported cheaply, irrespective of the nationality of the vessels. The shipping interests of the Northern States required the protection of a navigation act, which had been one of the principal inducements to their efforts toward strengthening the Federal government. These sections were also divided on the question of the slave trade. The Northern States had few slaves. The Southern States needed slaves, and the slave trade flourished in North Carolina, South Carolina and Georgia. The first great compromise of the Convention, the inclusion of slaves in estimating population as a basis of representation in the government, placed the Northern States, where slaves were few, at a disadvantage. Hence, they sought to prohibit or restrict the importation of slaves as a means of preserving their strength in the Union.

On August 24, the Committee of Eleven reported, recommending that the section of the proposed Constitution, requiring a vote of two-thirds of the members present in each house of Congress to pass a navigation act, should be stricken out; and that the section respecting the importation of slaves, should be amended so as to prevent the prohibition of the slave trade until 1800, and to permit duties on their importation "at a rate not exceeding the average of the duties laid on imports".[1]

On the following day, the Convention, upon motion of Mr. Pinckney of South Carolina, extended the period for the importation of slaves to 1808, and restricted the duty to ten dollars per person.[2] Consideration of the section relating to the

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1 Journal of the Federal Convention, Madison, Edited by Scott, 598
2 Journal of the Federal Convention, Madison, Edited by Scott, 608 609, 610.

passage of a navigation act was postponed. On August 29, this section being taken up, Pinckney of South Carolina moved "That no act of the Legislature for the purpose of regulating the commerce of the United States with foreign powers, among the several States shall be passed without the assent of two-thirds of the members of each house."[1] As the motion was not before the Convention, a vote was taken to postpone the matter under consideration, to make way for it. By this time the views of the North and South had been reconciled in the second great compromise of the Convention. The Northern States had agreed that the migration or importation of slaves should not be prohibited by Congress prior to 1808, and that no tax on such importation should be laid in excess of ten dollars per head. In return, the Southern States discontinued their opposition to the passage of a navigation act. Pinckney, in debate on his motion, urged that "considering the loss brought on the commerce of the Eastern States by the Revolution, their liberal conduct towards the views of South Carolina,[2] and the interest the weak Southern States had in being united with the strong Eastern States, he thought it proper that no fetters should be imposed on the power of making commercial regulations".[3] On the question to postpone, the vote was 7 to 4 against, South Carolina voting with the majority. The report of the Committee was then agreed to by the convention.

The States were not, however, willing to permit full unqualified power over commerce to remain in the hands of Congress They apprehended that some group of States, constituting a majority, might pass regulations which would be inimical to the minor-

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1 Journal of the Federal Convention, Madison, Edited by Scott,62
2 i. e. the permission to import slaves.
3 Journal of the Federal Convention, Madison, Edited by Scott,62

ity. On August 6, 1787, the Committee on Detail had included in its draft of the Constitution, the following clause: "No tax or duty shall be laid by the Legislature on articles exported from any state".[1] On August 21, this clause was agreed to.[2] On August 28, Mr. Sherman, reporting on behalf of a committee of which he was a member, recommended that the following should be added to the clause prohibiting the National Legislature from taxing exports:

"Nor shall any regulation of commerce or revenue give preference to the ports of one State over those of another, or oblige vessels bound to or from any State to enter, clear or pay duties in another. And all tonnage, duties, imposts, and excises laid by the Legislature, shall be uniform throughout the United States".[3] On August 31, these two provisions were considered and agreed to.[4] On September 14, the first provision was amended to read "No preferance shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another: nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another", in which form it now appears as a clause of the Constitution.[5] As has been previously mentioned, the second provision was annexed to the clause by which the power of taxation was conferred upon Congress.[6]

A paragraph had been reported by the Committee on Detail forbidding the imposition of duties on imports by the States, without the consent of the Legislature of the United States.[7] On August 28, this prohibition was extended to exports also. There was also added to the provision the words "nor with such

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1 Journal of the Federal Convention, Madison, Edited, by Scott 455
2 Journal of the Federal Convention, Madison, Edited by Scott 577
3 Journal of the Federal Convention, Madison, Edited by Scott 618.
4 Journal of the Federal Convention, Madison, Edited by Scott 647.
5 Journal of the Federal Convention, Madison, Edited by Scott 728.
6 Journal of the Federal Convention, Madison, Edited by Scott 724.
7 Journal of the Federal Convention, Madison, Edited by Scott 449, 459.

consent, but for the use of the United States".[1] On September 12 the report of the Committee on Style proposed that the portion of Section 10 of the Constitution dealing with the power of the States to lay duties should be adopted in the following form:

"No state shall, without the consent of Congress, lay imposts or duties on imports or exports; or with such consent, but to the use of the Treasury of the United States".[2] This clause being reconsidered, it was contended by Mason of Virginia that the restrictions would prevent the incidental duties necessary for the inspection and safe keeping of produce intended for export. Accordingly he moved that the section be supplemented by the following, "Provided, nothing herein contained shall be construed to restrain any State from laying duties upon exports for the sole purpose of defraying the charges of inspecting, packing, storing and indemnifying the losses in keeping the commodities in the case of public officers, before exportation".[3]

Doubts being expressed as to the ability of Congress to police this provision so as to prevent certain States from laying excessive duties on the exports made by their neighbors through their ports, under the guise of inspection duties, Mr. Mason met the objection on the following day, by substituting a motion providing "That no State shall be restrained from imposing the usual duties on produce exported from such State, for the sole purpose of defraying the charges of inspecting, packing, storing and indemnifying the losses on such produce, while in the custody of public officers; but all such regulations shall, in case of abuse, be subject to the revision and control of Con-

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1 Journal of the Federal Convention, Madison, Edited by Scott, 622, 623.
2 Journal of the Federal Convention, Madison, Edited by Scott, 699, 706.
3 Journal of the Federal Convention, Madison, Edited by Scott, 717, 718.

gress," which was agreed to.[1] On September 15, in consequence of the proviso agreed to on September 13, the second clause of Article I, Section 10, was adopted in the following form, in which it now appears in the Constitution:

"No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."[2]

On September 15, the third clause of Section 10 of Article I being discussed, Messrs. McHenry and Carroll moved that it be supplemented by the provision that "No State shall be restrained from laying duties of tonnage for the purpose of clearing harbors and erecting light-houses."[2] In debate the view was expressed by Madison that "whether or not the States are now restrained from laying tonnage duties, depends on the extent of the power to regulate commerce! These terms are vague, but seem to exclude this power by the States". He was convinced that the regulation of commerce "was in its nature indivisible, and ought to be wholly under one authority."[3] The majority felt that the regulation of tonnage was an essential part of the regulation of trade, with which the States "ought to have nothing to do." Accordingly it was moved and passed that the clause should be supplemented by the provision that "No State shall, without the consent of Congress, lay any duty of tonnage."[3]

On the same day, a final attempt was made to restrict the power of Congress to pass navigation acts. Mr. Mason of Virginia

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1 Journal of the Federal Convention, Madison, Edited by Scott, 719, 720.
2 Journal of the Federal Convention, Madison, Edited by Scott, 732
3 Journal of the Federal Convention, Madison, Edited by Scott, 733

expressing "his discontent at the power given to Congress, by a bare majority to pass navigation acts, which * * * would not only enhance the freight, * * * but would enable a few rich merchants in Philadelphia, New York and Boston, to monopolize the staples of the Southern States' and depreciate their value perhaps fifty per cent," moved a further proviso, "that no law in the nature of a navigation act be passed before the year 1808, without the consent of two-thirds of each branch of the Legislature," which passed in the negative.[1]

Adoption and Ratification of the Constitution.

On September 17, 1787, the engrossed Constitution was read and adopted in its present form. In submitting it to Congress, the delegates of the Convention recommended "that it should afterwards be submitted to a convention of delegates chosen in each State by the people thereof, under a recommendation of its legislature for their assent and ratification";[2] and that each convention ratifying it should give due notice of their action to Congress. By a further resolution, the Convention asserted that when nine States had ratified the Constitution, Congress should appoint a day on which electors should meet and vote for the President and time and place of commencing the business of government under the Constitution.[3]

On September 28, 1787, Congress having received the report of the Constitutional Convention, unanimously resolved "that the said report, with the resolutions and letter accompanying the same, be transmitted to the several legislatures in order to be

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1Journal of the Federal Convention, Madison, Edited by Scott 739.
2 5 Marshall's Life of Washington, 128, 129; Journals of Congress XII, 109; Political and Civil History of the United States, Pitkin, II, 224, 264.
3 Story on the Constitution, Vol. I, Paragraph 275.

submitted to a convention of delegates chosen in each State by the people thereof, in conformity to the resolves of the convention, made and provided in that case."[1]

Conventions were called by the legislatures of the twelve States which had been represented in the Constitutional Convention. All of these states except North Carolina having ratified, on March 4, 1789 Congress assembled and commenced proceedings under the Constitution. North Carolina ratified the Constitution in November 1789; and in May 1790, Rhode Island assented to the Constitutional Union.

The Congress of 1789 laid duties on imports, as well as a tonnage duty. Goods imported in vessels belonging to citizens of the United States paid ten per cent less duty than when brought in bottoms owned by foreigners. In addition, higher tonnage duties were exacted from foreign than from American vessels. These discriminations were intended to encourage American shipping and to countervail the Commercial restrictions of foreign nations.[2]

Conclusion.

The necessity for regulating commerce gave the immediate impulse to the establishment of a more perfect union. While the Articles of Confederation were fundamentally defective, union in the sense of a loose alliance might have been maintained indefinitely by the States, if Congress had been granted the power to regulate commerce among the states and with foreign nations. None of the evils proceeding from the weakness of the central government under the Confederation contributed more to the course of events, which step by step, brought the present form of government into existence, than the general conviction

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1 Journals of Congress, XII, 99, 110.

2 Political and Civil History of the United States, Pitkin, Vol. II, 325.

[illegible]

that commerce should be regulated by Congress.[1]

In fact, the view that our present form of government had its immediate origin in the necessities of commerce is supported by most excellent authority.[2]

The degraded state of American foreign commerce during the period of the Confederation was the prime incentive to the Con-

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1 Journal of the Federal Convention, Madison, Edited by Scott 33; The Federalist, XXII; Brown v. Maryland, 12 Wheat 419, 445; Cook v. Pennsylvania, 97 U. S. 566, 574; Northern Securities Co. v. United States, 193 U. S. 197, 352; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 470; Wabash Railway Co., v. Illinois, 118 U. S. 557, 572; Robbins v. Shelby Taxing District, 120 U. S. 489, 498.

2 Witherspoon's Motion, Gibbons v. Ogden, 9 wheat 1, 225; Webster's Argument in Gibbons v. Ogden, 9 wheat, 1, 11;
"Few things were better known, than the immediate causes which led to the adoption of the present constitution; and he thought nothing clearer, than that the prevailing motive was to regulate commerce."
Ibid, 12, 13:
"Over whatever other interests of the country this government may diffuse its benefits, and its blessings, it will always be true, as matter of historical fact, that it had its immediate origin in the necessities of commerce; and, for its immediate object, the relief of those necessities, by removing their causes, and by establishing a uniform and steady system." ** * * "If any one would look to the proceedings of several of the States, especially to those of Massachusetts and New York, he would see, very plainly, by the recorded lists of votes, that wherever this commercial necessity was most strongly felt, there the proposed new constitution had most friends."
Life of Webster, Curtis, I, 103:
"Maritime defence, commercial regulation, and national revenue were laid at the foundation of the national compact. They are its leading principles, and the cause of its existence. They were primary considerations, not only with the convention which framed the Constitution, but also with the people when they adopted it. They were the objects, and the only important objects, to which the states were confessedly incompetent. To effect these by the means of a national government was the constant, the prevalent, the exhaustless topic of those who favored the adoption of the Constitution."
Origin and Growth of the American Constitution, Taylor, 25:
"Just as the influence of commerce set in motion the forces that finally brought about the unity of law in Germany, so the influence of commerce set in motion the forces that finally compelled the intervention of the existing Constitution of the United States."

stitutional Movement.[1]

If the States had granted Congress the power to lay duties adequate to meet the necessities of government and to countervail British restrictions, perhaps the Confederation would have survived.[2]

Of this power, the improper exercise of which contributed to the Revolution and resulted eventually in that great definitive document calculated to preserve the liberties of the whole people, Justice Story says:

"It is a power vital to the prosperity of the union; and without it the government would scarcely deserve the name of a national government and would soon sink into discredit and imbecility. It would stand as a mere shadow of sovereignty, to mock our hopes, and involve us in a common ruin."[3]

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1 Speech of John Randolph on Internal Improvements, Garland's Life of Randolph, II, 205:
"This government grew out of the necessity, indespensible and unavoidable, in the circumstances of this country, of some general power, capable of regulating foreign commerce."
"The proximate as well as the remote cause of the existence of the Federal government was the regulation of foreign commerce."

2 Ibid.
"If the old Congress had possessed the power of laying a duty of ten per cent advalorem on imports, this Constitution would never have been called into existence."

3 Story on the Constitution, II, 2, 3.

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